SUPREME COURT, U. S.

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In the Supreme Court of the United States

October Term, 1968

No. 1273

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

THE PEMBEK OIL CORPORATION

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. LARKIN, 2d.
111 West Main Street
Waterbury, Connecticut 06702
Attorney for Respondent

INDEX

Jurisdiction 1
Question Presented 1
Statement of the Case 2
Argument 5
Conclusion 8
Appendix
Portions of Transcript of Testimony 1a
Slip Opinion Second Circuit, Schwarzenbach-Huber v. NLRB 20a
Slip Opinion Fifth Circuit NLRB v. J. M. Machinery Co. 61a

CITATIONS

Court Cases:

The Gissel Packing Co., 157 NLRB 1065 5
Medo Photo Supply Co., 43 NLRB 989 6
Medo Photo Supply Co. v. National Labor Relations Board, 321 U.S. 678 6
Midwest Piping Supply Co. Inc. 3
National Labor Relations Board v. Better Val-U Stores of Mansfield Inc. 401, F. 2d 491 6
National Labor Relations Board v. Flomatic Corp,. 347 F. 2d. 74 6
National Labor Relations Board v. Gissel Packing Co., #573 5
National Labor Relations Board v. J. M. Machinery Corporation (CA. 5) ..... F. 2d. 7
The Schwarzenbach-Huber Co. v. National Labor Relations Board (CA. 2) ..... F. 2d. 4, 6, 7
The Sinclair Co. v. National Labor Relations Board #585 5
The Sinclair Co., 164 NLRB #49 6
Statutes
Labor Management Relations Act, §29 U.S.C 157, 158 (a) (1), (3) and (5) 2, 7

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The Respondent files this brief in support of its position that this matter should not be reviewed by this Court.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The only question presented for consideration by this Court is the remedy as to whether or not the Respondent should be required to bargain with the Charging Union[1], concerning wages, hours and other conditions of employment of its employees who had abandoned the Union.

STATEMENT OF THE CASE

Pursuant to Rule 40, the Respondent desires to add cer-

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1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union #677 (hereinafter referred to as the "Union")

tain omissions to the factual setting as set forth in the Petitioner's brief.

At the outset it should be borne in mind that, other than the obtaining of the signature cards by Carl Collins, all of the events which not only encompassed the two unfair labor practice charges of 8 (a) (1) and (3), (29 USC 158(a)(1)&(3) but also the strike and repudiation of the strike, occurred within a 4-day period between Monday, September 12, and Thursday, September 15, 1966.

It was on Monday, September 12, that the Respondent received the bargaining demand and also fired Carl Collins. It was on Tuesday, September 13, that the Union held its first and only meeting of employees in Waterbury, Connecticut, at which time the employees who attended were for the first time confronted by the Union Business Representative Galullo, who told them that, if they failed to support the strike which was designed to force the reemployment of Collins, as well as the recognition of the Union, he would have nothing more to do with them (Tr. p. 265, App. p. 13A).[2]

On the following day, Wednesday, September 14, some of the employees formed a picket line while others, including the members of the Plumbers & Pipefitters Union, Local 21, worked. It was also on this date that for the first time Company and Union representatives met along with Federal and State Mediators in an effort to dissolve the strike. This meeting was unsuccessful in this regard.

After the meeting Mr. Galullo again admonished the strikers that, if they abandoned the strike and abondoned Carl Collins, he would have no more to do with them (Tr. p. 232 App.

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2. Reference App. p. are to appendix to this brief.

p. 8a). (Tr. P. 251, App. P. 12a) (Tr. P. 304 lines 7-10) app. P. 16a). Later that evening Rouleau, who appears to have been an employee with leadership, ascertained that the members of the Plumbers Union were not going to honor the strike or the picket line (Tr. p. 324, App. p. 19a), and he thereupon called other employees advising that he was going to abandon the strike, which meant abandoning the Union, and return to work the following morning (Tr. p. 324, App. p. 19a).

By agreement employees met at a restaurant near the Company's premises and agreed to go back to work if the Company would allow them to do so (Tr. p. 268, App. p. 14a). There is no question whatsoever that by this maneuver they thereupon abandoned, rejected and disavowed the Union, so that the later meeting with the Company had no bearing on their subsequent attempt to resign from the Union. Upon being advised, in answer to their question by telephone, that they were free to return to work, they did so on Thursday, September 15 (Tr. p. 268 App. p. 14a). After entering the Company premises they engaged in discussion with Company representatives, which discussion was general in tone and which discussion broke up on the premise that the employees would make specific suggestions to be presented at a later date.

The Company at this point sought legal advice as to its rights in dealing with the employees in the face of not only a demand for recognition but a petition for an election. They received advice that the National Labor Relations Board had a doctrine known as the Midwest Piping Doctrine, **Midwest Piping and Supply Co., Inc.**, 63 NLRB 1060, which provided in effect that when there was a representation question pending it was an unfair labor practice for the Company to bargain with its employees, collectively or individually. The Company thereupon advised the employees that it was against the law for them to bargain with the Union.

It now appears that, by telling the employees that it was against the law and refusing to bargain with them further, the Respondent violated the law, which amounts to a "damned if you do and damned if you don't result." See Medina, J. in **The Schwarzenbach-Huber Co. National Labor Relations Board** (CA. 2) F. 2d. ; slip opinion page 1368 (App. p. 43a).

After the employees were told by the Company that it was illegal for the Company to talk to them while a representation question was pending, the employees endeavored to ascertain what their rights were, as well as their legal position regarding the Union (Tr. p. 227, App. p. 3a). Their efforts to ascertain these facts illustrate vividly that the rank and file employee, no matter how well educated, has absolutely no knowledge of the whys and wherefores of the labor-management relations, and particularly what an authorization card means, practically, legally or any other way. They attempted to contact and did contact a representative of the Connecticut Board of Mediation and Arbitration, who had been present at the attempted strike settlement session on the preceding day, and obtained no information from him (Tr. p. 229, App. p. 4a). They received no answers to their questions from Mr. Galullo, the Union Business Agent (Tr. p. 230, App. p. 5a) (Tr. 269 App. p. 14a) and thereafter attempted to get a definitive answer from the National Labor Relations Board itself; that is, what effect did their cards have (Tr. p. 229, App. p. 5a); again, no answers, uncertainty and frustration. The fact that thereafter they sought their own legal advice and made demand for the return of their cards is an anticlimax (Tr. p. 233 App. p. 8a).

The important point to be considered in this Court's decision as to whether the Board's remedy of bargaining should be adopted is that all of this illustrates that these men had no conception whatsoever that these cards would be used in the

manner in which the Board is now attempting to use them. They did not understand their import, and obviously they did not intend that the result the Board is seeking would come about.

The record repeatedly illustrates this uncertainty concerning the legal consequences of the cards and their use to force the Union on them; Employee William F. Carlson was told by the Union Organizer, "by the signature of the card it didn't mean we were members of the Union" (Tr. p. 239, App. p. 11a); Employee Donald MacLellan testified, "I was just told about what seemed to be assumed among the employees that these cards authorized us more or less to talk to the Union to see what they had to offer" (Tr. p. 301, lines 17-20, App. p. 16a); and Employee Felix George Rouleau testified, " I asked Collins if this card we would be sending in would be binding us to the Union in any way, and he informed me that it wouldn't" (Tr. p. 320, lines 1-3, App. p. 18a) . . . ." "This card was not to be binding to me in any way, binding me to the union in any way" (Tr. p. 322, lines 7-8, App. p. 18a).

ARGUMENT

The Petitioner seeks to have the instant case held until this Court renders its decisions in **National Labor Relations Board v. Gissel Packing Co.** #573 and **The Sinclair Co. v. National Labor Relations Board** #585. The Respondent does not agree that the factual situation and background leading up to the Board's order to bargain with the Union in those cases is comparable to the factual situations herein.

In **Gissel,** 157 NLRB 1065 at 1081, the Trial Examiner found that during the period from September 1964 to April 1965 **Gissel** engaged in threats, interrogation, intimidation, surveillance of Union meetings and discharges, whereas in the instant case, as has been pointed out above, at the time of the

refusal to bargain, September 13, 1966 (G.C. Ex. 6, Petitioner's Appendix C, pp. 40a-41a), the only unfair labor practice committed by the Respondent was the discharge of Carl Collins, which the Trial Examiner found to be discriminatory.

Likewise in **The Sinclair Co.,** 164 NLRB #49, the Board found that from June, 1965, until December 9, 1965, when the Union lost the election the employer had engaged in an extensive anti-Union campaign which was violative of Section 8 (a) (1) of the Act. There is therefore, a decided distinction between The Sinclair Co. and the instant case.

The Petitioner further relies heavily on this Court's decision in **Medo Photo Supply Corp. v. National Labor Relations Board,** 321 U.S. 678. The Respondent to the contrary asserts that the rationale of Medo has no relationship whatsoever to the instant case. In Medo the Board found as a fact 43 NLRB 989 at 994 that "if the proposed contract 'constituted a reasonable basis for negotiations' the respondent would consent to the Union's being certified after a check of its cards or an election and that the respondent would thus bargain with the Union."

In Medo also the Board, p. 998, found that the respondent **after having recognized** the Union then dealt directly with its employees. Such is not the instant situation.

It is the Respondent's feeling that the remedy here fails directly in line with the philosophy that Judge Medina expressed in **Schwarzenbach-Huber Co.,** supra, which case is the obvious culmination to the Second Circuit's disenchantment with the Board's bargaining order as expressed in the opinion below, which followed the same Court's reasoning in **NLRB v. Flomatic Corp.,** 347 F. 2d. 74, and **NLRB v. Better Val-U Stores of Mansfield, Inc.,** 401 F. 2d. 491, and which Judge Simpson

expressed in J. M. Machinery Corp., **National Labor Relations Board v. J. M. Machinery Corporation** (CA. 5) F. 2d. , Slip Opinion #23756, (App. p. 61a), namely that for the Board to turn these employees over to the Union and to name the Union as the bargaining agent would be a very definite violation of Section 7 of the Act. (29 USC 157).

As the Fifth Circuit said in **J. M. Machinery,** p. 11, Slip Opinion (App. p. 71a), "We must carefully examine the effect of signing within the context of solicitation in order to determine if the employees understood what they were signing."

Judge Medina in **Schwarzenbach-Huber Co.** said p. 1369 (App. p. 44a) Slip Opinion, "This 'representation' card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be by-passed and the Union ushered in without giving the employes individually or collectively any voice in the matter . . . ."

"The invention and implementation of a scheme by which employees can be befuddled into thinking they are asking for a free election at which each can cast a secret ballot either for or against the Union, whereas they are in fact held to be signing away this very right without knowing they are doing so, seem to us to be a clear violation of Section 7. By the same token the bargaining order in this case nullifies the beneficent purposes of the Act and in no possible way can be said to effectuate the purposes of the Act. The forgotten man seems to have been the employee who was one of those who comprised the unit of production and maintenance workers in the Company's Juniata Plant."

In the instant case the employees involved, as explicit from their testimony set forth in the Appendix, did not sign

these cards in any respect with the understanding that the Union would thereupon willy nilly represent them. Consequently the adoption of the remedy sought by the Board would completely frustrate the purposes of Section 7 of the Act.

Insofar as this remedy is concerned, it is further the Respondent's opinion that the petition for certiorari should not depend on the Court's action in Sinclair and Gissel but that the petition should be denied based upon the arguments above adduced.

CONCLUSION

Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

May 12, 1969.

WILLIAM J. LARKIN, 2d.
111 West Main Street
Waterbury, Connecticut 06702
Attorney for Respondent

APPENDIX

TRANSCRIPT OF TESTIMONY

217

* * *

WILLIAM F. CARLSON

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * *

221

Q Was there a discussion about the strike at that time among you?

A The discussion was that we decided among ourselves that we go back to work, to go back to talk to Pembek.

Q And did you do that?

A Yes sir, we did.

Q When?

A Approximately 8:30 we went to Pembek.

* * *

225

THE WITNESS: Yes, they did. When they came to us, Jack informed us that he had just heard from his lawyer, Mr. Larkin, that we were members of the union because of the signatures on these cards which we did not know, and as of that time they could say nothing to us or negotiate anything whatsoever with us, and this is all they said.

Q (By Mr. Zankel) Did that end the conversation and the conference on September 15?

A That is all that Jack and Fred said, yes, and they turned around and walked out again.

Q What did you employees do?

A We were very upset to think that we were in the union because of the signatures of these cards. None of us understood that when we signed them although we did read

them, most of them read them.

MR. ZANKEL: I move to strike the answer as unresponsive.

TRIAL EXAMINER: Obviously the witness cannot tell what someone else knew. He can only talk about what he himself knew. You tell us what you yourself knew when you signed the card.

MR. ZANKEL: I would object to the Trial Examiner's request, sir.

TRIAL EXAMINER: Tell me what you yourself thought. You can't tell me what anyone else thought.

THE WITNESS: About this card?

TRIAL EXAMINER: What you thought you meant by signing the card.

MR. ZANKEL: May I be heard on the objection on the record?

TRIAL EXAMINER: Yes.

MR. ZANKEL: I think that the Examiner at this point goes directly to the subjective intent of the card signing. Now, while I don't say that this intent is entirely irrelevant because there are certain circumstances where it might be relevant, however, in this particular instance you have before you in evidence a clear and unambiguous legend on

this card. The witness has testified that he has read it, and I submit to you that the outstanding case authority would
227
say under these circumstances it would be improper to inquire into the card signers subjective intent.

TRIAL EXAMINER: I think your point is well taken. I am reversing my ruling and sustain your objection. So don't tell what you or anybody else thought about the card.

MR. ZANKEL: I have no further questions.

TRIAL EXAMINER: Mr. Larkin?

CROSS EXAMINATION

Q (By Mr. Larkin) Mr. Carlson, what did you do after Jack Grant and Fred Knell came out and told you that they couldn't talk to you?

A I started to say the men were kind of upset to think that the men were in the union.

MR. ZANKEL: Objection. The questions calls for an activity and not a thought.

TRIAL EXAMINER: I will overrule your objection.

Q (By Mr. Larkin) Go ahead.

A Would you repeat the question.

TRIAL EXAMINER: Will you read the question.

(The question was read as follows: "Mr. Carlson, what did you do after Jack Grant and Fred Knell came out and told you that they could not talk to you?")

THE WITNESS: The men and I decided we would find out how true it was that we were, by the signing of these cards, members of the union. We did remember from the
228
day before that a meeting was held at the Holiday Inn be-

tween the union, Pembek and the mediation board. I think this was the word, it was a mediation meeting. But any how, we tried to find out among ourselves. I think, I seem to remember, I think I remember that we asked Mr. Emery, Mr. James Emery if he recalled any of the names that were mentioned or that were there at this meeting at the Holiday Inn, and I think he said he didn't remember. So as I said, we wanted to find more information because Pembek couldn't talk to us. We had no one to talk to other than ourselves. So Jack Grant was out in the yard. He was loading an oil truck. One of the fellows went to him and asked if he could give us the name — I think he was a federal man or a state man — that was there so we could at least call him to talk to him. Well, I think I—

TRIAL EXAMINER: The person who had been present at the meeting the previous day?

THE WITNESS: Yes, sir. I think his name turned out to be Mr. Donnelly from the State Labor Board in Hartford. So we got on the phone and got information out of Hartford to find out where this labor board was. After a few calls we did contact Mr. Donnelly's office. We were informed then that he was not there, that he was home. They didn't mind giving us the telephone number, and I made the call, and I think it was North Haven, and I asked

229

Mr. Donnelly if he could give me any information in respect to the way these cards were signed and how we were affected with the union. Well, Mr. Donnelly couldn't give us any information. So then we were at a standstill again.

So again we tried to think of someone we could call to get more information, and I asked Jack if he could give me the name of, I think he is a federal man out of Boston. Now, I don't recall whether his name was McGurty or McNerny,

something like that, but anyhow, and if we could also have the address or telephone number of this place in Boston. Mr. Grant gave me this, and I made a call to Boston, and I talked to this fellow up there, and he said that the cards, I'm pretty sure he said that the cards were valid and that they, somewhere along the line, your Honor, I don't recall this for sure. Someone said that these cards were valid or binding or binding up to six months. What this meant I don't know. So, anyhow, once we knew that we were automatically members of the Teamsters Union, we decided to call Mr. James Galullo in Waterbury to find out a little more information.

James Emery called Mr. Galullo. I called Mr. Galullo's office in Waterbury and James talked to him.

TRIAL EXAMINER: What day was this?

THE WITNESS: This was the 15th.

TRIAL EXAMINER: You made the call but Emery 230 talked?

THE WITNESS: I dialed.

TRIAL EXAMINER: You dailed and you gave the phone to Emery?

THE WITNESS: Right.

MR. ZANKEL: 15th day of what?

THE WITNESS: September.

TRIAL EXAMINER: Go ahead.

THE WITNESS: What the conversation was about, your Honor, I can't honestly tell you other than the fact that Galullo said that we were in the union.

TRIAL EXAMINER: He told this to Emery?

THE WITNESS: I think so, I'm not sure.

TRIAL EXAMINER: Did Emery tell this to you?

THE WITNESS: Yes, he did, sir, but it was so much confusion that day in all our minds, I can't honestly say what he said.

So that's where it stood, and this is where it has stood.

Q (By Mr. Larkin) Thereafter did you decide to do anything further?

A Yes, sir.

Q What did you do?

A Well, if I may go back just a little bit, the day before—that would have been Wednesday—

TRIAL EXAMINER: The day before you called Mr. Galullo?

THE WITNESS: This was Wednesday, the day of the strike, the day we were out. After this meeting at the Holiday Inn, James Galullo, Carl Collins and James Emery

231

came back from this meeting and Carl Collins asked Jimmy Galullo, "Listen, if these guys want to go back to work, if you want to give me another job, I will take it. These guys can go back to work."

TRIAL EXAMINER: I can't quite follow.

THE WITNESS: Mr. Collins said to Jimmy Galullo—

TRIAL EXAMINER: Collins said to Galullo?

THE WITNES: Right.

TRIAL EXAMINER: That is Carl Collins?

THE WITNESS: Yes, sir, Carl Collins, yes. Collins said to Galullo, he asked Mr. Galullo if these fellows, namely, ourselves, wanted to go back to work, what would happen. Galullo stated right there and then he would have nothing to do with us whatsoever.

MR. ZANKEL: Mr. Examiner, I move to strike the witness' reply up to this point as being completely unresponsive and irrelevant. The question was what did he do. He was not asked to describe a prior conversation.

TRIAL EXAMINER: This is true. The witness' answer which the witness just gave is not responsive. On that ground, I will strike the answer.

232

MR. LARKIN: I will withdraw the question.

Q (By Mr. Larkin) Mr. Carlson, on the previous day, the day of the strike you testified there was a meeting at the Holiday Inn?

A Yes, sir.

Q Attended by company and union representatives and some mediators?

A Yes, sir.

MR. ZANKEL: Objection.

TRIAL EXAMINER: On what ground?

MR. ZANKEL: I don't believe Mr. Carlson so testified.

TRIAL EXAMINER: Overruled.

MR. ZANKEL: I will agree Mr. Galullo—

TRIAL EXAMINER: Your objection is overruled.

Q (By Mr. Larkin) After the meeting was over, did Messrs. Galullo, Collins and Emery come back to the picket lines?

A Yes, sir.

Q Where was— was there a conversation at that point?

A Yes, sir.

Q Did Mr. Collins say anything about the men going back to work?

A I am almost positive that he asked Mr. Galullo, he said to Mr. Galullo, "Listen, if these guys want to go back to work, I will take your job." In other words, the job that was offered to him the night of the meeting over at Waterbury. Mr. Galullo said, "If these guys go back to work or go back down to the yard, I am through with them."

Q. Did he say, "If you don't stand behind Carl Collins, 233
I am not going to have anything to do with you"?

A Yes, sir, he made that statement.

Q Well, on the 15th you finished talking or Jim Emery had finished talking with Mr. Galullo, after that date did you do anything about your card?

A Did I do anything about the card?

Q Yes.

A Yes, I tried to find out myself, including all the rest of the men, how valid this thing really was.

Q What did you do?

A We decided among ourselves that we would seek legal counsel.

Q And who was your legal counsel?

A Well, at the time of the discussion, we had a choice of two attorneys. John Kraemer was the one that we selected.

Q And you want to see Mr. Kraemer?

A Yes, sir.

Q And as a result of your visit, showing you Respondent's 7(c), is that your signature?

A Yes, sir.

MR. ZANKEL: I thought those were— all right, I'm sorry.

Q (By Mr. Larkin) Was that paper drawn up by Mr. Kraemer at your direction?

Yes, it was.

237

Q And you signed it?

A I was in the yard at Pembek.

Q Do you recall when this was?

A I would guess a good week and a half after Carl came to work.

Q Is it before you signed them?

A Oh, yes, because I hadn't got the card then.

Q Would you relate that conversation?

A Will I what?

Q Tell us who said what, what you said and what Collins said at that time.

A Carl asked me if I thought there were enough men interested in talking to a union man about forming a union, and I said to him I thought that there were, and he said to me that if there were enough men interested, he would contact a union man, and I don't know whether he said 677 or what the number was, but he said that he would see to it that some information was sent to us, and these cards, and that is when we got these. All we had to do was sign the cards and send them back in, and this is what we did. This is what I did.

Q Did you ever ask Carl Collins if you signed the card what that would mean?

A It seems that I remember that we asked, I asked whether or not this was going to be—No, sir, I don't remember.

Q Do you recall whether or not you asked him if you

signed the card that it would mean you would be a member
238
of the union?

A Yes, sir, I think I do believe I did ask him that.

Q What was his reply?

A No—

MR. ZANKEL: Mr. Examiner, may I inquire when this conversation occurred?

TRIAL EXAMINER: He said sometime shortly after Collins came to work for the company. He was unable to fix the date with certainty but before the cards certainly.

MR. ZANKEL: If the witness understands that is the period.

TRIAL EXAMINER: We are talking about the same period aren't we?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Before the card was sent to you in the main?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Is that satisfactory, Mr. Zankel?

MR. ZANKEL: Yes, sir. Thank you.

239

Q (By Mr. Larkin) Did you or Collins say anything more about the cards as to what they were for in that conversation?

A I understood it to be the signature on this card was only to show Mr. Galullo or the union that there were enough men interested in maybe forming a union.

TRIAL EXAMINER: Is that what you understood?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did you tell this to anybody or anybody else tell you this?

THE WITNESS: All the men were in agreement.

TRIAL EXAMINER: Did somebody tell you that this was the purpose of the card or is this something you yourself arrived at?

THE WITNESS: Carl Collins stated by the signature of the card it didn't mean we were members of the union.

TRIAL EXAMINER: That he said to you, but did he say anything else?

THE WITNESS: I don't really remember, your Honor.

Q (By Mr. Larkin) Did you have any talk with Collins and say to him that you wanted the Pembek employees to have the first say?

A Yes, sir, I did.

Q What did you mean by that?

MR. ZANKEL: Objection.

TRIAL EXAMINER: On what ground?

MR. ZANKEL: I think we are going far afield, Mr. Examiner, when we inquire as to the subjective intent again of a remark that seems to be clear.

TRIAL EXAMINER: Well, I am certain it is not clear to me. Now, what was the question?

(The pending question was read by the reporter.)

THE WITNESS: Meaning that once we were told or 240 once we were asked to sign these cards, we thought that it was only a show of strength, as I said before, that enough men were interested in the union. We were, I was led to believe that that signature on this card only meant that Jimmy, as Carl related or told us, Mr. Galullo would come

to Pembek and tell Pembek that enough men were interested in probably forming a union, and that after this talk took place, then it would be up to us to decide whether or not we wanted to vote the union in or listen to what Pembek had to say, but Pembek never had a chance to say anything.

TRIAL EXAMINER: I am confused. Are you telling me that this is what Mr. Collins told you, or is this something you, a conclusion you arrived at from something else which Mr. Collins told you?

THE WITNESS: I think it is my own conclusion.

TRIAL EXAMINER: That is what I wanted to know.

* * *

All right.

251

* * *

THE WITNESS: I don't recall anything specific that they said, your Honor, except everyone looked disgusted, nothing had been settled. We thought certainly something would happen, and as it turned out, nothing happened. I sensed, we all sensed Carl felt sorry for us in some little way.

TRIAL EXAMINER: Don't tell us what you felt or what anyone else felt. Tell us what was done, what was done with respect to this phrase "I will take this job that you offered me last night."

THE WITNESS: Carl asked Jimmy or he said to Jimmy "If these fellows want to go back to work, they can, and I will take that job that you mentioned the other day," and Mr. Galullo said if we want back to work or went down that driveway, he would have nothing to do with us.

259

JAMES H. EMERY

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * *

265

Q Now, at that meeting in Waterbury, did Mr. Galullo ask the men if they were going to back Collins?

A Yes, sir.

Q And what else did he say?

A About backing Collins?

Q Yes.

A That if we didn't back him, then he didn't want any more to do with us, that he would put Collins to work and the rest of it he would read about.

* * *

268

A He informed me that several of the men were going back to work, and he also read a newspaper clipping that came out that morning, and he was quite upset about it at the time, and after he read it to me, I was too.

Q Showing you what has been marked as Respondent's Exhibit No. 8 for identification, is that the newspaper article that he read to you?

TRIAL EXAMINER: You mean this is 9?

THE WITNESS: I believe that was it.

MR. LARKIN: Question withdrawn.

Q (By Mr. Larkin) After Mr. Carlson read this article to you, what did you then do?

A I told him I would be right there.

Q And what occurred at the meeting at Flynn's restaurant?

A Trying to decide how many of us was going back to work, and finally decided that everybody was and we left.

Q Did you leave there and go to work unannounced or how did it come about?

A Bill Carlson called Mr. Grant and asked if it would be all right.

Q All right?

A To come back down to the shop.

Q And you all went down?

A Right.

Q After you got down there, Mr. Carlson related that you had a conversation in the office, all the men together, with

Messrs. Grant, Knell and Thuotte, and then you went to the back and were told by Jack Grant that he couldn't talk to you, is that right?

A That is correct.

Q Thereafter there was testimony that you called or talked to Jim Galullo on the telephone?

A That is correct.

Q Now, will you relate that conversation?

A I called him and told him that we didn't want anything to do with the Teamsters Union. I also asked him about these cards, how long we were bound to them, and he said we weren't bound to the cards. We didn't pay any dues or have any union benefits, that this meant that they would represent us, and asked him how long they were binding and told him that we didn't want him to represent us, and he said he wouldn't give me any direct answer as to how long they wese binding except to say that as soon as the charges were settled. I believe that is the way he put it.

Q And as you recall, that was the extent of that conversation?

A Approximately. I told him that we wanted out because we believed we were misled into it, and the rest of it, I think, we had quite a long conversation, but it was mostly around this same thing, about this same thing.

Q About the cards and—

* * *

296

DONALD MACLELLAN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

* * *

301

THE WITNESS: I was asked if I would sign.

Q (By Mr. Larkin) At that point?

A Yes. I was given a card.

Q Did you read it?

A No, I didn't.

Q Just signed it?

A I signed it.

Q Did you know what you were signing?

MR. ZANKEL: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Larkin) Did anybody tell you what you were signing?

MR. ZANKEL: Objection, asked and answered.

TRIAL EXAMINER: Overruled.

THE WITNESS: I was just told about what seemed

to be assumed among the employees that these cards authorized us more or less to talk to the union to see what they had to offer.

Q And after that you signed them?

A —

Q You have to say yes or no?

A Yes.

* * *

304

A Well, he was down there, yes.

Q Do you recall?

A I recall he had a different statement to make, yes.

Q What was the statement he made at that time about the picket line?

A Well, one was if we broke the picket line and went back to work, he would be through with us, and not to even bother phoning him, that he would pick up his signs and he would be through with us.

* * *

309

TRIAL EXAMINER: Now, you testified that somebody told you that the cards, that you had to sign a card or the employees had to sign cards before the employees could talk to the union. Do you remember testifying to that effect?

310

THE WITNESS: No. I said I talked or talk was among the employees that we wanted to talk to the union, see what they had to offer and cards were more or less permission to talk to the union.

TRIAL EXAMINER: Who said that to you or who told you that?

THE WITNESS: It was the general conversation between a number of the employees.

TRIAL EXAMINER: There was no representative of the union at that time, was there?

THE WITNESS: No.

TRIAL EXAMINER: Do you want to inquire along these lines, the line I opened up?

MR. LARKIN: Was Collins there?

TRIAL EXAMINER: Well, just a moment. Let Mr. Zankel go first.

MR. ZANKEL: I have no questions along that line.

RECROSS EXAMINATION

Q (By Mr. Larkin) Was Collins there?

A Yes.

MR. LARKIN: As far as I am concerned, he is a representative of the union, Mr. Trial Examiner.

MR. ZANKEL: Is that a question?

MR. LARKIN: This is my statement.

* * *

317

FELIX GEORGE ROULEAU

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

* * *

319

Q Prior to signing this card, General Counsel's Exhibit 17, had you had any conversation with Carl Collins about the card?

A. Yes.

Q And where did you have these conversations and when?

A It was back in Pembek's yard. Now, the date I can't give you, but it was prior to sending this card in.

320

Q And what was the conversation you had with him?

A I asked Collins if this card we would be sending in would be binding us to the union in any way, and he informed me that it wouldn't.

Q Was that the whole conversation?

A That was just about it.

Q Did he say anything about what the card was for?

* * *

321

THE WITNESS: Yes, I can't give you an exact quote

322

because this is too long ago, but I do know that he told me that this was just an introductory card, that I was to attend a meeting to see what the union had to offer and so forth.

Q (By Mr. Larkin) Did you ask him whether or not the card meant you were in the union if you signed it?

A Oh, yes. I answered that that was the point I wanted to make first. This card was not to be binding to me in any way, binding me to the union in any way.

Q And after that conversation, you signed it?

A After that conversation, I signed it, yes.

* * *

324

THE WITNESS: We have to go back now to the night before. After we came home from the walkout, I called Mr. Niland. He is a member worker of Pembek.

TRIAL EXAMINER: After you came home after picketing all day?

THE WITNESS: After picketing all day. I called Mr. Niland and asked him if he worked that day, and he said

yes, he worked because he didn't honor this walkout because it was an unauthorized walkout, and he was going to work along as usual. Bob Schellinger, I guess, is also a member of the same union. So then I figured if they aren't honoring this walkout, there must be something wrong here some place. So then I began calling each one of the fellows who walked out, and I told them I don't care what they are going to do, but the way things are, I am going back in in the morning. I told them they could do what they wanted, but I was going back, and I called each one of them and told them the same thing, and they in turn informed me that they were going to come in because I informed them of the telephone call I made to Jimmy.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 130—September Term, 1968.

(Argued November 8, 1968 • Decided March 5, 1969.)

Docket No. 32286

THE SCHWARZENBACH-HUBER COMPANY,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Intervenor.

Before:

MEDINA and WATERMAN, *Circuit Judges,*
and LEVET, *District Judge.**

Petition for review and cross-petition for enforcement of an order of the National Labor Relations Board.

Schwarzenbach-Huber Company petitions to review and set aside an order of the National Labor Relations Board finding the Company in violation of Sections 8(a)(1)(2) and (5) of the National Labor Relations Act, as amended,

* Of the Southern District of New York, sitting by designation.

29 U. S. C., Sections 158(a)(1)(2) and (5), setting aside a representation election, and directing the Company to bargain with the Union. The Board cross-petitions for enforcement. The decision and order of the Board are reported at 170 N. L. R. B. No. 176 (April 17, 1968).

Petition to review granted; cross-petition for enforcement granted in part and denied in part.

MARSHALL C. BERGER, New York, N. Y. (Robert Abelow and Weil, Gotshal & Manges, New York, N. Y., on the brief), *for petitioner.*

RICHARD N. CHAPMAN, Attorney, National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Lawrence M. Joseph, Attorney, National Labor Relations Board, Washington, D. C., on the brief), *for respondent.*

DANIEL B. JORDAN, New York, N. Y. (Cornelius J. Collins, Jr., New York, N. Y., on the brief), *for intervenor.*

MEDINA, *Circuit Judge*:

Schwarzenbach-Huber Company, a textile manufacturing concern with its principal place of business in New York City, petitions this Court to review and set aside an order of the National Labor Relations Board and the Board cross-petitions for enforcement.

This case presents a sequence of events in a familiar pattern. The Textile Workers Union of America AFL-CIO

used what is now commonly called the "representation" card method of obtaining the support of a majority of the production and maintenance workers in the Company's Juniata plant in Altoona, Pennsylvania. Claiming to have cards signed by a majority of the workers in the unit, the Union by letter of February 9, 1967 demanded a recognition of the Union and immediate collective bargaining. On February 13, 1967 the Union filed a petition for an election. On February 14, 1967 the Company by letter expressed its doubt that the Union represented "most or many" of its employees in the unit. The letter also joined in the Union's request for an election. On March 16, 1967 the election was held and the Union lost by a substantial margin. Thereafter proceedings were instituted by the Union to set the election aside, to establish various alleged unfair labor practices by the Company and to order the Company, without any new election, to bargain with the Union. These proceedings were consolidated; and, after a hearing and findings by the Trial Examiner, the Board set the election aside, held the Company's doubt that the Union had a majority was not a good faith doubt, sustained *in toto* all the claims of unfair labor practices; and, finally, on the ground that the unfair labor practices were so outrageous and pervasive as to dissipate the Union's majority prior to the election and that they made any new election in the foreseeable future impracticable, the Board ordered the Company to bargain with the Union.

We hold that neither on February 9th nor at any time prior to February 14th did the Union have in its possession valid cards signed by a majority of its production and maintenance employees. We set aside as not supported by substantial evidence on the record as a whole the finding that the Company's doubt that the Union had in its possession cards signed by a majority of its production and

maintenance employees was not a claim made in good faith. We sustain the Board's finding of two of the alleged unfair labor practices. As to the other findings of alleged unfair labor practices, we set them aside and refuse enforcement on the ground that such findings of unfair labor practices are not supported by substantial evidence on the record as a whole. We set aside and refuse to enforce the bargaining order as the Union did not have a majority, as the Company's doubt that the Union had a majority was made in good faith and as the making of a bargaining order under the circumstances of this case would clearly not effectuate the purposes of the Act.

Part I

The Bargaining Order.

The propriety of enforcing an order to bargain after a union has lost a representation election depends on the resolution of three questions: (1) whether the Union in fact had a majority; (2) whether the employer refused to bargain because of a good faith doubt of such majority, if the Union had a majority; (3) whether on all the facts of the election situation a bargaining order is an appropriate remedy for enforcing the policy of the National Labor Relations Act.

A

Did the Union Have a Majority?

The initial inquiry must, of course, relate to the number of employees in the unit. The Trial Examiner, all of whose findings were adopted by the Board, finds the unit was composed of 197 employees. This included Joan Iaia and

Ruby Evans, to the inclusion of whom, says the Trial Examiner, the General Counsel "takes no serious exceptions." Indeed, there was no basis for any objection whatever, as these two women were classified as weavers, they spent most of their time on the floor operating the looms and only a part of their time teaching the others how to operate the looms. The name of Marjorie Krise is apparently omitted, as her name "does not appear on the eligibility list as prepared by the Company for the March 16 election." Mrs. Krise should have been included in the unit. The uncontradicted evidence is that she and her husband had worked in the plant for a long time. In November, 1966 she told the Company "I'd like a layoff for medical and personal reasons." While she considered her personal health a private matter, there is other evidence in the record to indicate that the layoff was due to an allergy she had for silk and silk was then being worked in the plant. In February of 1967 her husband noticed that certain jobs were indicated on the Bulletin Board and she told him that she was interested in going back to work and would he see Mr. Kozak, the Personnel Manager. He saw Mr. Kozak who said he would be glad to see her. This was reported to Mrs. Krise. She saw Mr. Kozak and went back to the plant on February 20th. She had previously worked as a creeler but came back in a different department as an examiner, clearly within the category of a production or maintenance worker. If the fact that her name was not on the eligibility list has any significance, it is sufficient to say that the eligibility list was prepared as of the period "ending February 11, 1967," prior to the time when Mrs. Krise came back to work. As the name of Joyce Jewell, who quit work after the preparation of the eligibility list, was eliminated, it is clear that the name of Marjorie Krise should have been included.

Thus the unit becomes 198. The name of Vivian Becker, who was a regular worker but who was laid off temporarily in the early part of February because she had to find a new babysitter to take care of her children while she worked, should also have been included. This brings the total in the unit to 199.

The next consideration is the cut-off date. The Board concedes in footnote 20 on page 23 of its brief that "it does not rely on cards signed after February 14."[1] The Trial Examiner does not clearly state the fact that on February 9th, when the initial demand for recognition was made, the Union did not have a majority. But he finds that between February 9th and February 14th "4 additional employees signed representation cards," and he says the Union thus "obtained a majority of 103 cards out of a total of 199 unit employees, even assuming that Becker and Krise are to be included in the unit." This is on the theory that the Union's demand was of a continuing nature.

We hold that under the circumstances of this particular case the cut-off date is February 9, 1967, when the letter claiming a majority was sent by the Union. Since we find, as is disclosed in the ensuing discussion, that the Union had no majority on February 9, 1967, a compelling reason for

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1 This "concession" seems to imply that cards "signed" on or before February 14 should be counted. Of course, the date of the signing of the cards has no significance. Many of the employees signed cards and retained them at home or in their pockets or elsewhere for periods of several days, as appears in the Appendix to this opinion. They did this, we have no doubt, because they had not yet made up their minds to make the cards effective by delivering them to the Union. The significant date is the date on which the signed card is delivered to the Union.

Moreover, in no event could cards delivered to the Union on February 14 be counted, as the Board itself has ruled that the cut-off date cannot be later than the day before the date of the refusal to bargain. *Gotham Shoe Manufacturing Co.*, 149 N. L. R. B. No. 80, *enforced*, 359 F. 2d 684 (2d Cir. 1966).

this ruling is afforded by the fact that Frazier directed a wholesale distribution of copies of this letter at the plant gates on February 10. The intended effect of this widespread diffusion of the Union's false claim that it had a majority was undoubtedly to bring the reluctant sheep into the fold by telling them the fight was over, the Union had won and they might as well get on the bandwagon. No cards handed to the Union after the making of such a misrepresentation could possibly be deemed valid.[2]

We turn to the cards. During the oral argument of this case we made a request that the cards be sent to us. When they arrived they had been thoroughly shuffled and scrambled. It did not seem possible to arrange them in a meaningful way. But continued study of what appeared on the face, and what appeared also on the reverse side of each card, finally led to a solution which perhaps we should have noted in the beginning. The key to the cards is to be found in the symbol appearing on the reverse side of each card on the right near the top. When these cards are arranged in sequence from 1 to 122, in accordance with the symbols appearing on the reverse side of the cards, we can get a completely dependable factual pattern of the order in which the cards were counted. So that this may be checked by any interested person, we have added as an Appendix to this opinion a complete list of the 122 cards, arranged in the order just above described, together with the data appearing both on the face and on the reverse side of each card, including the date and time of filing with the Board.

The Examiner finds that the 4 additional employees above referred to are represented by cards numbered 101,

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2 See *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179-180 (2d Cir. 1962); *N. L. R. B.* v. *H. Rohtstein & Co.*, 266 F. 2d 407 (1st Cir. 1959).

96, 100 and 102 and he thus reaches the erroneous conclusion that the Union had 103 cards on February 14, 1967. Card No. 96 is particularly interesting. It is the card of Helen McKendree. The date is "2 1967." It was received at the plant gate on February 10, 1967 at the very time that copies of the Union's letter claiming a majority were being distributed. But it is erroneously given the number 96. It could not properly be counted as constituting one of the majority referred to in the letter of February 9th as the card was not received by the Union until February 10th. By some strange method of computation the Hearing Examiner counted this card as one of the "99 cards" he says were held by the Union at the time of the demand. And he counted this card again as one of the "4 additional employees." The correct number of cards in the possession of the Union on February 9, 1967 was 98.

The other 3 supposedly "additional" cards are also interesting. Card No. 100 was signed by Maury L. Delozier on February 13 but it was not delivered to the Union until February 21. This is after the cut-off date, so we still have only 98. Card No. 101 was signed by John Biancone on February 14 and delivered to the Union on the same day. This was too late; we still have 98. Card No. 102 was signed by Calsie D. Gearhart on February 11 but was not received by the Union until February 13, after the cut-off date of February 9, 1967.

Accordingly, we are compelled to conclude that on the cut-off date of February 9th the Union did not have a majority. And this remains true even if Krise and Becker are not included in the unit.

B

Are Many of the Cards Vitiated by Deceitful and Fraudulent Misrepresentations by the Union?

The chief professional union organizer was Carl Frazier an International Representative of the Textile Worker Union. Working as his lieutenant and next in comman was James Meyers. 35 cards were signed at the meeting o January 29, 1967. A few were signed at later meeting sponsored by the Union. Most of the cards were obtained by personal solicitation, which varied from visits to the homes of the workers to the passing out of the cards with or without an explanation of their purpose.

A very considerable number of those who signed the cards testified at the hearing. The result, however, was that the Trial Examiner counted all 122 cards which he characterized as "an overwhelming majority." The way this was done can be described as nothing short of extraordinary. Relying on *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963), *enforced*, 351 F. 2d 917 (6th Cir. 1965) and *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), the Trial Examiner held that unless a card signer had been told that the "sole" or "only" purpose of the card was to obtain an election, the signing of the card was a sufficient demonstration of an intention to appoint the Union as bargaining agent and that there was thus established an irrebuttable presumption which could not be neutralized by any testimony by the employee as to what he or she understood by the various representations made by Frazier or the other Union solicitors. In one or two instances where the testimony indicated that the representation was that the "sole" or "only" purpose of the cards

was to get an election, the Trial Examiner accepted these cards also, as he found the testimony not credible.

We turn first to the 35 cards signed at the meeting of January 29th. Frazier himself testified that he read the entire printed matter on the card, word for word, and that he made the following representations at the meeting of January 29, 1967: (1) if the Union lost the election the cards would be returned; (2) that the Union must have 30 per cent "of the people" before the Union can petition for an election; (3) "there has to be 51 per cent of the people vote for a Union." There was considerable testimony by employees to the effect that they were told that by signing the cards they would save $5. This seems to have been on the theory that, as no payment whatever was necessary to validate the card, they would save the payment of the initiation fee or dues generally required. What Frazier omitted to tell those present at the meeting is similarly established by Frazier's testimony that he did not tell those present that, even if the Union lost the election, it could still demand recognition and the right to bargain upon the basis of the cards. That he knew this to be so is clear from his testimony that, while he made no such statement at this particular meeting, he did make such a statement at other meetings. We think these flagrant misrepresentations and this wilful omission were deceitful and that the effect of making them was to perpetrate a fraud on those present at the meeting who signed the cards.

While none of the employees was permitted to testify to what these misrepresentations meant to him, we think the inference is perfectly plain. Each man present at the meeting must have concluded: "we employees are not accepting Union membership unconditionally. If there are enough cards to get an election, and an election takes place, I can

vote for the Union or against the Union as I choose. And, if the Union wins, I save $5. If the Union loses, that is the end."

Frazier was especially emphatic in insisting that he had never said to anyone, at the meeting or anywhere else, that the "sole" or "only" purpose of the cards was to obtain an election.

Thus because of these flagrant misrepresentations and this wilful concealment, we have no alternative other than to invalidate the entire 35 cards signed at the meeting of January 29th.

Against this background it is, we think, of no significance that none of the signers of any of the cards demanded the return of his card by the Union. The *ex parte* action of the Union in sending union membership cards and union literature to each person who signed a card is likewise of no significance in the light of the representations made by Frazier.

To cover the matter of the cards more thoroughly we specifically invalidate the cards of six employees. Three of these, Jonas Corbin, Jr., William Slone (whose card was erroneously recorded by Frazier as Stone) and Walter Delozier, attended the meeting on January 29, 1967. The other three, William Nolan, Ronald Taddy and Patrick O'Hara, so far as appears, did not attend the meeting of January 29, 1967.

Jonas Corbin, Jr. was an active supporter of the Union who, after signing his card at the meeting, distributed cards to other employees and urged them to sign for the Union. He was asked what Mr. Frazier said at the meeting:

> A. Mr. Frazier said that the cards were—that we were signing the cards so that we could get an election down at the plant.

Q. Did you ask any questions? A. Yes, sir.

Q. What was the question you asked? A. I asked why, I asked why it said on the card that we were signing to become a member of the Union; I asked whether we were actually a member of the Union, were they going to collect dues from us if the Union wasn't voted in and Mr. Frazier then told me, he said, "No, you will get your card back if the Union isn't voted in."

Q. Did he answer your question in any other way? A. To the best of my recollection, all he wanted was to get 30 per cent of the cards signed, 30 per cent of the people to sign blue cards so we could get an election.

He also testified that after the meeting as people were picking up and signing the blue cards, "the word came to me" that the people signing before the election "would save five bucks."

His understanding of what the cards meant is demonstrated by his statement, in turn, to those ten people to whom he distributed cards:

Q. Did you tell them anything about the purpose of the cards or what they meant? A. I told them that we had to sign 30 per cent of the people in the plant before we could even get an election and get the thing over with one way or another.

Clearly, the expectation that Corbin generated and that Frazier had generated in Corbin was that there would be an election to "get the thing over with one way or another." If the Union lost, the cards would be returned and no dues would be owed; if it won, an early signing would have saved five dollars. Signing the cards was meant to bring an election. To gain signatures by telling the employees

that there would be an election, without also telling them that the cards alone might be used to gain representative status, is a sufficient misrepresentation to invalidate the cards. When the employees were told, in effect, that they had nothing to lose by signing and could, by signing, save money and get an election to "get the thing over," this indicates that there was no intention to unconditionally authorize the union as the representative of the workers.

William Slone attended the meeting and signed his card there. He testified that at the meeting "they said they needed 30 per cent of the cards to have an election," also that by signing the card the initiation fee would be saved. He specifically remembered Frazier stating: "if the Union was not voted in, that these cards would be returned to you in the mail." In obvious reference to the election, he recalled that Frazier had said: "We need cards to get the ball rolling."

Walter Delozier recalled that when Frazier was asked at the meeting about the language on the cards that says "you belong to the Union when you sign it," he replied: "This is just to get the show on the road, so we can get a vote in your plant." When pressed on cross-examination he recalled an even stronger statement:

> Q. What did Joness (sic) Corbin say at the meeting that you attended? What questions did he ask Frazier? A. He stood up and said, "I have a question" and he said, "O.K.," and he said, "Is this card just to get a vote in the plant or company?" He said either one, I don't know which.
>
> Mr. Frazier said, "Yes, it is." But it doesn't say that on the card. Then he explained that it only takes 33 per cent of these cards to get a vote and the question was dropped right there.

As Delozier testified succinctly: "I read the card but I took Frazier's word."

When we turn to the testimony of employees who did not sign at the meeting of January 29, 1967, we find the same pattern of misrepresentation, half-truth and evasiveness by the Union organizers.

William Nolan had signed a card at his home. When asked what Harry McGraw, who had given it to him, said, he replied:

> A. He said they had to have a certain percentage to join the Union, to get a Union started.
>
> Q. Did he say anything about an election? A. Yes, he said there would be an election.

He also recalled that he had been told that the Union needed 30 per cent of the cards to get the Union started and bring about an election. The single, positive representation that there would be an election, without any indication that cards alone could bring in the Union without or despite an election, is sufficient to invalidate this card.[3]

Ronald Taddy was given a card by James Meyers, Frazier's assistant. When he asked Meyers about the card, Meyers replied that they had to have 30 per cent to have an election. When pressed on cross-examination, as to whether he had been told that signing the card "would help you get the Union," he replied instead that "It would help us get an election." He testified that Meyers had said nothing to him about dues but that "it was rumored around the mill—" and then he was cut off.

Patrick O'Hara was told:

> A. Well, it would save you the first year's fee and that they would use the card to get the majority of the

3 *N. L. R. B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967).

> cards signed, you know, but it was to get a vote going in an election.

Guella, also told him that the first year's fee was five dollars, and that "the purpose of the card was to have enough cards to get a vote." When he was asked if he had ever asked for his authorization card back, he responded:

> A. No, I didn't. May I ask one thing? I was under the understanding when I received—.

He was not permitted to testify to his understanding but from the testimony in the record, it is clear that he like the others thought that signing the card would bring an election and, if the Union succeeded in the election, would save dues for a year.

We specifically invalidate the cards of Jonas Corbin, Jr., William Slone, Walter Delozier, William Nolan, Ronald Taddy and Patrick O'Hara.

We do not find in the testimony of these witnesses the "conglomeration of self-contradictions and inconsistent statements" to which the Trial Examiner makes reference. On the contrary, the testimony of these witnesses is clear and entirely consistent with the testimony of Frazier as described in Part I B of this opinion.

C

The Aftermath and the Balance of the Cards.

As the Board in its brief, footnote 20 on page 23, states: "the Board does not rely on the cards signed after February 14," no explanation is required of the large number of cards that came into the possession of the Union thereafter. But the Hearing Examiner counted all 122 cards. So, for the sake of completeness, we shall go into the question of how the Union procured this large number of cards.

It will be recalled that, despite the demonstrable lack of a majority on February 9, the Union distributed at the plant on February 10 copies of the letter of February 9 asserting the Union's false claim that it possessed a card majority on February 9. The effect of this additional misrepresentation is shown in the Appendix. Indeed, this new maneuver worked so well that the Union on March 3, 1967 mailed the following letter (Respondent's Exhibit 22-a) to each employee who had not already signed a card:

TEXTILE WORKERS UNION OF AMERICA
Affiliate of the AFL-CIO and CLC
1060 Broad Street
Newark 2, N. J.

March 3, 1967

Dear Friend:

We have just received the complete list of Schwarzenbach-Huber employees from the Labor Board. According to our records, you have not signed a Textile Workers Union Membership Authorization Card.

We regret that we could not write to you sooner because our mailing list was not complete.

With the Secret Ballot Election just a few days away, we want to take this opportunity to invite you to join with the *MAJORITY* of your co-workers who have already signed Union cards.

The Textile Workers Union and your TWUA Local UNION is open to all Schwarzenbach-Huber employees. The TWUA is here to help all Schwarzenbach-Huber workers—not just a select group.

Even though we are confident of victory, since a *MAJORITY* have pledged to support our Union—you

know as well as we know that a big Union vote will mean a strong local union at Schwarzenbach-Huber—which will result in *HIGHER WAGES, MORE BENEFITS* and *BETTER WORKING CONDITIONS* for *YOU, THE WORKERS!*

Be a chartered member before the election—please come to the planned rally that will be held before the election.

REMEMBER—"IN UNITY THERE IS STRENGTH"

Fraternally yours,

/s/ CARL E. FRAZIER
Carl E. Frazier, Int'l Representative

D

The Law.

It may be doubted that the courts deciding *Cumberland*[4] and *Joy Silk*[5] ever intended the rules enunciated in those cases to be applied "so woodenly" as the Board did in this case and others, to use the expression of Judge Wisdom in *N. L. R. B.* v. *Southland Paint Company*, 394 F. 2d 717, 725 (5th Cir. 1968). See the reinterpretation of *Cumberland* by the Sixth Circuit in *N. L. R. B.* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir. 1967). In any event this *per se* approach has been very generally criticized[6]

4 *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1963), *enforced*, 351 F. 2d 917 (6th Cir. 1965), *supra et passim.*

5 *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), *supra et passim.*

6 See Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851 (1967); Comment, *Refusal-To-Recognize Charges under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. Chi. L. Rev. 387 (1966); Note, *Union*

and the rulings of these two cases have suffered much erosion.[7] In this Circuit the *Cumberland* rule has been rejected. *Bryant Chucking Grinder Co.* v. *N. L. R. B.*, 389 F. 2d 565 (2d Cir. 1967) concurring opinion of Judge Friendly, at page 569, citing *N. L. R. B.* v. *S. E. Nichols Co.*, 380 F. 2d 438 (2d Cir. 1967).

The *Nichols* rule, at page 444, is succinct and comprehensive:

> The decisive question is whether the employees "meant to make the Union their representative" or instead "understood the cards not to be votes for the Union" but rather requests "that an election should be called at which they would vote for or against the Union as they then pleased."

And again, at page 445:

> Employees * * * who were willing to be represented by a union if the employer acquiesced on a showing of a majority might well not cavil over the union's being able to force recognition without an election if the

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Authorization Cards, 75 Yale L. J. 805 (1966). See also, R. Winter, *Judicial Review of Agency Decisions: the Labor Board and the Court*, in 1968 The Supreme Court Review 53 (P. Kurland ed. 1968).

7 See, e.g., *N. L. R. B.* v. *Texas Electric Cooperatives*, 398 F. 2d 722 (5th Cir. 1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4th Cir. 1968); *N. L. R. B.* v. *Lenz Co.*, 396 F. 2d 905 (6th Cir. 1968); *N. L. R. B.* v. *Southland Paint Co.*, 394 F. 2d 717 (5th Cir. 1968); *N. L. R. B.* v. *Lake Butler Apparel Co.*, 392 F. 2d 76 (5th Cir. 1968); *N. L. R. B.* v. *Arkansas Grain Corp.*, 390 F. 2d 824 (8th Cir. 1968); *N. L. R. B.* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304 (7th Cir. 1968); *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4th Cir. 1967), *cert. denied*, 390 U. S. 1028 (1968); *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967); *N. L. R. B.* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir. 1967); *N. L. R. B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (1st Cir. 1967); *Engineers and Fabricators, Inc.* v. *N. L. R. B.*, 376 F. 2d 482 (5th Cir. 1967); *Bauer Welding and Metal Fabricators, Inc.* v. *N. L. R. B.*, 358 F. 2d 766 (8th Cir. 1966).

employer did not. It is quite a different matter to permit a union to attain recognition by authorization cards procured on the affirmative assurance that there would be an election without a further clear explanation that the cards can and may also be used to obtain recognition without any subsequent expression of preference by the employees; such a half-truth gives the employees the false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth.

This would also seem to make it improper in cases to come before us in this Circuit to exclude evidence of understanding and intention as held in *Joy Silk*. Thus, whether an ambiguity appears on the face of the card, or as the result of a statement made by the union solicitor, and in all cases of misrepresentation and omission such as we have in this case, the burden rests on the General Counsel to establish by a preponderance of evidence that the signer of the card intended to do more than merely to indicate his desire that there be an election to decide whether or not the Union should be the bargaining representative of the employees in the unit. See *N. L. R. B.* v. *Peterson Brothers, Inc.*, 342 F. 2d 221, 224 (5th Cir. 1965). Without such proof the cards subject to such infirmities must be discarded as invalid.

The cases indicate that the cards used by the various unions are worded differently. Some of them, as mentioned by our Brother Friendly in a footnote to his opinion in *Nichols*, 380 F. 2d at page 442, contain in the printed matter a statement that the signer of the card accepts membership in the Union. Such a statement appears on the cards used by the Union in this case. In the context of the misrepresentations and omissions by the Union representatives and

solicitors in this case we think the precise wording of the printed matter on the cards cannot change the result in those instances where we have invalidated the cards.

E

Was the Company's Claim That the Union Lacked a Majority Made in Good Faith or in Bad Faith?

From the background we have already sketched it would seem that any doubt concerning the Union's majority would have been clearly justified as made in good faith. It was Brooks Taylor, the plant manager, who wrote the letter of February 14th, in which it was stated that the Company doubted the Union's majority status as asserted in its letter of February 9th. This letter was prepared after consultation with the Company's counsel in New York who either supplied the wording of the letter or the contents before it was written.

In the part of his decision stating his reasons for rejecting the Company's claim of a good faith doubt that the Union had in its possession cards signed by a majority of the employees and could prove it, the Trial Examiner quotes the following excerpt from Taylor's testimony:

> Q. Isn't it true that you received General Counsel's Exhibit No. 8 [the Union's demand letter] on February 10, Friday? A. I believe so, yes.
>
> Q. What was the first thing you did when you got that letter? Didn't you contact your attorney in New York? A. Probably, yes.
>
> Q. I show you General Counsel's Exhibit No. 9, which is a letter signed by you written to the Union dated February 14, 1967, and ask you that isn't it true that your attorneys either gave you the wording or the contents of that letter before you wrote it? A. Yes.

One would suppose that this indicated disapproval by the Trial Examiner of the seeking of legal advice by an employer. But the Board, in footnote 1 to its decision, says:

> Respondent asserts in its brief that the Trial Examiner relied on the fact that the Respondent consulted its attorney before replying to the Union's request for bargaining in finding that Respondent had no good-faith doubt of the Union's majority status. We do not believe that the Trial Examiner relied on the fact that Respondent consulted its attorney, nor do we.

This is not the first time this has happened. We wish to make it plain that employers as well as unions have a perfect right to consult their lawyers. That is what lawyers are for. If consultation with counsel indicates anything, it shows a desire to conform with legal requirements, to obey the law. It is quite reprehensible and wrong to insinuate, or to imply or to state that an adverse or damaging inference or deduction is to be made from the fact that an employer consults his lawyer in connection with any matter involving the relationship between an employer and his employees or a Union or in connection with any labor dispute or controversy.

To back up his contention that the Company's doubt of the Union's majority status was genuine Taylor testified to a number of significant circumstances that had come to his attention, some of which were hearsay. As he was testifying to his own state of mind, this hearsay was clearly admissible. Thus he said that he heard the Union started organizing not in late January, as asserted by the Union but in October or November, passing out a pamphlet which had a detachable card on the back that persons could cut out and return to the Union expressing their interest. He

also heard of meetings on Sunday afternoons in November and December but heard there never were more than 17 present and the earlier effort seemed to have died down. He heard about the meeting in late January and thought there were about 35 to 40 persons there, most of whom signed cards. As he calculated, adding this number to the 17 who had attended meetings in November or December, would bring it up to about 45. This was an inconsiderable number in view of the size of the unit. He also testified that the Company had many older employees who had been with the Company at the time this very Union had gone through prior elections, which the Union had always lost. He also testified that he heard that cards were being signed by employees just "to get people off their backs" and he did not feel that they were signing "without this pressure on them."

Taylor's doubt was not rejected because the Trial Examiner did not believe him. Indeed, his testimony was direct, responsive and frank, so far as we can tell from the record. The rejection by the Trial Examiner of the Company's alleged good faith doubt seems to be based on some theory of punishment for the alleged unfair labor practices which, even though most of them happened after the period February 9—February 14, are supposed to evidence a determination "to gain time in which to dissipate that majority." A finding based upon any such theory cannot stand. Moreover, the Trial Examiner erroneously placed the burden of proof to "demonstrate the good faith required to justify his failure to bargain" upon the Company.[8]

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8 *Lane Drug Co.* v. *N. L. R. B.*, 391 F. 2d 812 (6th Cir. 1968); *Textile Workers Union* v. *N. L. R. B.*, 386 F. 2d 790 (2d Cir. 1967); *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198 (2d Cir. 1967); *N. L. R. B.* v. *Great Atlantic & Pacific Tea Co.*, 346 F. 2d 936 (5th Cir. 1965); *Hercules Packing Corp.*, 163 N. L. R. B. No. 35 (1967); *Aaron Bros.*, 158 N. L. R. B. 1077 (1966).

These alleged unfair labor practices will be discussed in detail later in this opinion. It will suffice to say now that we find most of them not supported by substantial evidence on the record as a whole. The two that we do sustain and will enforce relate to the Clyde Brown incident which happened on February 21st and the formation of the Committee in violation of Section 8(a)(2) which took place after the election.

That the Board's rejection of the Company's good faith doubt finds no substantial support in the record as a whole is further demonstrated by some of the reasons given by the Trial Examiner for rejecting it.

On February 2nd Walter Delozier, Rodger Trotter and Donald Craig came in and told Taylor that many employees were signing cards because they were tired of being pressured both at work and at home to sign the cards and because they were tired of listening to pro-Union and anti-Union discussions at every turn. On the advice of his counsel Taylor made a memorandum which is Respondent's Exhibit 5, signed by him and also signed by Delozier, Trotter and Craig. A somewhat similar memorandum is Respondent's Exhibit 6 dated February 7th. These memoranda are given no weight by the Trial Examiner because they are "largely self serving" and because they are not corroborated by the employees "who supposedly were so pressured." The fact that the memoranda, prepared on the advice of counsel to serve as corroboration and to refresh Taylor's recollection, are self serving is a strange sort of objection. Of course, they are self serving and their validity depends only upon Taylor's credibility, which is unquestioned on the point of good faith and which is corroborated by the signatures of Delozier, Trotter and Craig. At least as to the signature of Walter Delozier this can be compared

with the signature on his card. Moreover, there is ample testimony in the record that pressure was brought to bear on many of the employees.

The Hearing Examiner adds as a further reason tha the employee witnesses produced at the hearing had been first interviewed by counsel for the Company only a few days before the hearing. The Trial Examiner evidently thought that counsel should have interviewed the employees some time in February or March. Had he done so, it is easy to imagine that this would have been alleged as another unfair labor practice. This is just another instance of the "damned if you do, damned if you don't" approach by the Board that we criticized in *N. L. R. B.* v. *Dorn's Transportation Company, Inc.*, decided January 9, 1969, Slip Sheet p. 863 at p. 878. Moreover, when the interviewing was done, scrupulous care was taken to advise the persons interviewed that they were not required to answer the questions if they did not wish to and that whatever they said would have no effect whatever on their continued employment.

A further argument on the good faith issue is that the Union in its letter of February 9, 1967 offered to prove it had a majority and the Company did not accept this offer. A similar argument is found in Board rulings and court opinions in many cases of the same type as the one before us. We hope this opinion will help to expose the unreality and complete futility of such alleged offers to prove possession of a card majority. Of course the Union does not mean that it proposed to let the employer see the original cards and do its own counting. If the Union had meant to propose a cross-check by the employer, it would have said so. If what is meant is to submit the cards to some impartial person for a count, where could such a

person be found with the requisite knowledge and experience to make a proper count, in view of the fact that the count as made by the Board itself was full of errors, miscalculations and ambiguities, as we have already demonstrated? How would the impartial person, perhaps a priest, a minister or a rabbi, know whether to go by the dates on the face of the cards or the dates on the back? How would he know the correct number of persons in the unit? If he counted as of February 9, 1967, which is the most natural date to select, he would come out with the answer that the Union did not have a majority. Above all, how would he know what representations had been made, and what relevant factors had been concealed by the union organizers? The whole thing is absurd. The plain truth of the matter is that the offer of proof is of no consequence whatever in this case. The employer had no alternative other than to disregard it.

While the Trial Examiner concludes that the asserted reasons for withholding recognition "have no basis in fact," we are of a contrary view.

F.

Is the Bargaining Order in This Case an Appropriate Remedy for Enforcing the Policy of the National Labor Relations Act?

What do all these miscalculations and errors of fact and law by the Board add up to? Surely they do not support the widely held supposition that the Board and the Trial Examiners have a special expertise to handle this type of case. This "representation" card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be by-passed and the Unions ushered

in without giving the employees individually or collectively any voice in the matter. And this is accomplished by the invention of new *per se* rules of evidence and new standards by which the proofs are to be evaluated, that fly in the face of common sense and elementary concepts of justice and fair play.

The very keystone of the Act is Section 7.

Rights of Employees

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The invention and implementation of a scheme by which employees can be befuddled into thinking they are asking for a free election at which each can cast a secret ballot either for or against the Union, whereas they are in fact held to be signing away this very right without knowing they are doing so, seem to us to be a clear violation of Section 7. By the same token the bargaining order in this case nullifies the beneficent purposes of the Act and in no possible way can be said to effectuate the purposes of the Act. The forgotten man seems to have been the employee who was one of those who comprised the unit of production and maintenance workers in the Company's Juniata Plant.

Part II

The Unfair Labor Practices.

We sustain and will enforce the Board's finding of a Section 8(a)(1) violation for having reprimanded employee Brown for Union activities during working hours, and we also sustain and will enforce the Board's finding of a Section 8(a)(2) and (1) violation for establishing, and then dominating and supporting the Employee Committee after the election. We set aside and refuse to enforce all the other findings of unfair labor practices by the Company as not supported by substantial evidence on the record as a whole. Each of these findings will now be discussed in some detail.

A.

The Meetings With Small Groups of Employees.

Some weeks before the election, and with the election in mind, the management of the Company decided to hold a series of meetings with small groups of the employees, sometimes with 5 to 7 employees, sometimes with as many as 8 to 10 employees in attendance. The issue is whether or not the discussions at these meetings interfered with, restrained, or coerced the employees in the exercise of their Section 7 rights.

In this Circuit the controlling authority is *Bourne* v. *N. L. R. B.*, 332 F. 2d 47 (2d Cir. 1964), where we held, at page 48: "Under our decisions interrogation, not itself threatening, is not held to be an unfair labor practice unless it meets certain fairly severe standards." Five factors are frequently relevant: (1) whether there is a record of employer hostility; (2) is the information such as to have a potential use against an individual employee; (3) the

identity of the questioner; (4) is there unnatural formality in the place and manner of interrogation; and (5) the truthfulness of the replies.

Before applying these standards it is well to bear in mind that the meetings with small groups of employees were dialogues rather than interrogations. What management was trying to accomplish had a double aspect: (1) to ascertain from the employees what their gripes and complaints were; and (2) in the context of a discussion of what the employees thought the Union could do for them in the light of these complaints, to counter the arguments put forth by the Union in its books and pamphlets and by word of mouth. The employees had no reluctance to voice their complaints. Indeed, in many instances these were stated with some enthusiasm. Randy Thompson, one of the members of the Union Committee and a strong Union supporter, testified that the method pursued by Taylor was to read from a book that had been passed out at the gate by the Union "something about the booms are dropping," and then comment on what he had read in order to give the Company's point of view on the particular subject covered by the quotation. Naturally and properly the Company took the position that the employees should cast their secret ballots for the Company and against the Union. Under these circumstances, assurances against reprisals would have been wholly inappropriate. Moreover, the fact that the discussions were held with small groups rather than with individuals is a further support for the Company's position.

We proceed to apply the *Bourne* standards:

(1) In this case there is no record whatever of hostility to the Union.

(2) There were no threats, direct or indirect, to discharge any employee nor was any employee discharged. Indeed, we can find nothing in this record to support the view that any of these dialogues was designed to probe for information that could be used against any of the employees. There was no grant of benefits to the employees.

(3) Those who conducted these discussions varied, generally Taylor, the Plant Manager or Vice President Elden or both were present. Lewis and Rabenstein were also present at some of the meetings. Lewis was the training manager and foreman of the third shift. Rabenstein was standards engineer and responsible for the "method time measurement" system. Both were properly found by the Board to be supervisors. Taylor, Lewis and Rabenstein were in constant day-to-day contact with the employees, Elden also but to a lesser degree. There is no indication that any one of these three appeared as a formidable personality who was held in awe by any of the employees. The discussions appearing in the record seem to have proceeded on the part of the employees in a natural and quite candid and uninhibited way.

(4) As above indicated the dialogues proceeded in the most informal manner. But the place where they were held was the subject of extended testimony and discussion at the hearing. This was because the Union was trying to make it appear that the room had the stamp of high-level management and discipline upon it in such fashion as to overawe the employees. While in one sense this room could be called the conference room, this is only because there was in it a conference table surrounded by 8 chairs. In fact the employees were constantly in and out of this room, as it contained the desks of Grossman and Kozak, a sick

room or dispensary, the Xerox machine and certain files. It seems to us that the only reason this room was chosen for the meetings is that it was the most convenient room in which to hold such discussions. This was a familiar and reasonably quiet area and it was certainly not a clearly demarked, seldom-entered management province.

(5) The truthfulness of the replies to questions is supposed to indicate the fear or lack of fear or inclination to evasion experienced by the employee. Here the readiness of the employees to discuss their gripes dispels any notion of fear. The whole atmosphere is epitomized in employee Melvin Kintz, Jr.'s testimony that, at one of these meetings he was asked why he needed a union to speak for him since he spoke so well for himself, and he replied that it didn't matter how well he spoke for himself if nobody in authority would listen.

The finding of interference, restraint or coercion of employees by these group meetings is wholly unsupported by substantial evidence on the record as a whole. Indeed, unless an employer can in some such fashion as in these group meetings put its side of the case before its employees just prior to an election, the Union with its professional organizers such as Frazier and Meyers, and its books, leaflets and pamphlets, would have the field to itself.

B.

The Alleged Threat to Close the Plant.

This is the most serious and the closest issue before us. Schwarzenbach, the President of the Company, had not, at least for some years, addressed his employees. In what he had every reason to suppose was a critical hour he ad-

dressed them in several shifts a few days before the election. Here are some excerpts from his speech:

> To say I am concerned about the future of the mill is putting it mildly.
>
> That he had invested a lot of money in the plant, that he could easily sell it or lease it to a company like Sylvania.
>
> That it was an old company, which had been in the area for a long time, that the plant had gotten along without a union, and that if the Union got in or failed to get in "they were going to try to make a go of it either way."
>
> A few employees testified that Schwarzenbach said he would try to keep the plant going if the Union won, but he didn't see how he could do it.

Schwarzenbach also made reference to the permanent closing in 1953 of the Altoona Rayon plant.

On March 2, 1967 the Company issued to its employees a single-sheet cartoon showing a sketch of its Juniata plant with the following in large print:

> We have, here in Altoona, one of the finest textile mills in the world . . . South Carolina not excluded. (Don't let's wreck it now!)

Below this heading is a sketch of a plant in ruins, with the subhead: "Remember Altoona Rayon?"

The gist of what remains to support this charge of threatening to move the plant is contained in the following quotation from Schwarzenbach' letter of March 9, 1967 to the employees:

> No matter what the TWUA may promise you, the Juniata record is a darn good one. Compare your

wages, your holidays, your benefits, to industry figures, *to those in our own Front Royal mill for that matter!* Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? *Why isn't there a single major textile operation left in the northeastern states?* Is that the kind of job security the union keeps talking about?

Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, dissension and unreasonable demands that come with the TWUA. *Remember Altoona Rayon?*

Virtually all of Stehli's fabric requirements now are being woven down south. These are fabrics which for many a year were mounted on Juniata looms. Those same southern mills are just waiting to supply Mr. Hommel with every yard of computer fabric he requires. *For Juniata there is no alternative but to again become competitive.* (Emphasis in original.)

It was stipulated that Altoona Rayon had closed its plant permanently in 1953 while under contract with the Textile Workers Union of America, the Union involved in this case.

There are occasional references in some of the group meetings to the possibility that the mill might be closed. The Trial Examiner reports an instance in which Taylor referred to the "New England" plant closing down because it could not compete, and Randy Thompson asked him point blank "if he was saying the Union caused them to close down," to which Taylor replied, "You said that, not us." In a similar incident employee Kintz testified that Elden replied, "I'm not allowed to say that." In another incident, employee Wilson testified that Rabenstein was worried be-

cause, if the Union got in, it could possibly mean his job and many others. We give these peripheral facts solely for the sake of completeness. The real thrust is in the speeches, the cartoon and the letter of March 9, 1967, supplemented by Schwarzenbach's letter of March 20, 1967, after the election, in which he stated, "what actually was at stake was the future of the mill and the long-term security of your job."

We thus approach the sensitive area of First Amendment rights of free speech where in a variety of contexts the Supreme Court has urged that these preferential rights be preserved. In particular we are to decide whether what was said and written on behalf of the Company exceeded the bounds of lawful expression within the meaning of Section 8(c)[9] of the Act, which was a new provision and became part of the Taft-Hartley Act in 1947. We follow and reaffirm the rationale of *N. L. R. B.* v. *Golub Corporation,* 388 F. 2d 921 (2d Cir. 1967), in which our Brother Friendly illuminated the text with a most helpful sketch of the historical background of Section 8(c).

Thus, the test is whether the fears expressed by Schwarzenbach were "shown to have so far transcended the bounds of reason as to justify the Board in finding them to be disguised threats of reprisal." 388 F. 2d at page 929. Doubtless a good faith doubt or prediction "could so far outrun any possible basis for it" as to justify the Board in concluding that a threat was intended. 388 F. 2d at page 928.

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9 Sec. 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

What was the crisis that impelled Schwarzenbach to write in his letter of March 9, 1967: "To say that I am concerned about the future of the mill is putting it mildly"? The answer is to be found in the letter, which according to the teaching of *Golub*, and of common sense as well, must be taken in its entirety. Thus viewed, and we have reproduced the letter in the margin,[10] the crisis was an economic

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10 (Letterhead of The Schwarzenbach Huber Co.,
470 Park Avenue South, New York, N. Y. 10016)

March 9, 1967

Dear Employee:

The Juniata mill has been through a number of crises in its 54-year history. None, however, do I consider as serious as the one it faces right now. To say that I am concerned about the future of the mill is putting it mildly.

About three years ago, after more than a decade of progress and steady employment, performance at Juniata began to slip. To make matters worse, at about the same time our main product, off-loom acetate fabrics, began losing favor with the consumer. Our largest customer, Stehli, under severe competitive pressure, began checking around for another source of these fabrics. A year ago they discovered that a better quality piece of goods could be purchased, at a lower price, from that southern giant, J. P. Stevens. Since that day Stehli orders have been few and far between.

Juniata, to survive, now required not only lower costs and fewer seconds, but a new product! Fortunately, our typewriter and computer ribbon sales had been growing slowly but steadily. Here possibly was the product! Last spring it was decided to strip Front Royal of these constructions and concentrate all nylon weaving at Juniata. We believed a solution had been found, but alas our troubles had only begun!

Most of you will remember last summer's chaos at Juniata. Low efficiency, terrible quality, poor earnings, all of which led to astronomical financial losses to the company. Worst of all, we were no longer delivering goods to our customers.

In desperation, our Industrial Fabrics Division repeatedly requested permission to have their goods woven on the outside. My answer this time was no for I knew that once these fabrics were handed over to a southern mill they would never again be woven at Juniata. *Without this work the mill was dead!*

Just when things look blackest, efficiency and quality started to pick up. By the end of the year the mill was back under reasonable control and all of us in New York heaved a sigh of relief. Though costs were still a long way from what they will have to be, and seconds still a burden, we were back in business and once again shipping goods to

one. The mill had been through a number of such crises in its 54-year history. The mill had been losing money, and Schwarzenbach gives chapter and verse, mentioning details that no man in his senses would have dared to state if they were fabrications, as the employees knew these facts as well as he did. Was it mere fiction that virtually all

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our customers. Many of us believed that enough time had been gained in which to buckle down and improve overall mill performance.

This was not to be. A group of hotheads among you has now decided to exploit a situation which for over a year has been highly explosive. This group tells you that by joining the TWUA you will be getting better earnings, better working conditions, better benefits and, of course, job security!

With 20 years of this business and numerous union elections (3 of them right in Juniata) under my belt, I know all this to be empty promises. *It has long been Company policy to pay at Juniata as well or better than our competitors.* If a raise, additional benefits, pensions, or whatever are truly in the cards, then you will get them! For this you need no TWUA, no $60.00 a year deducted from your pay-check. What you will not get and what the TWUA cannot get for you are benefits that lead to excessive costs. *No company can survive selling its product at a loss,* and this is exactly what we have been doing these last 8 months.

No matter what the TWUA may promise you, the Juniata record is a darn good one. Compare your wages, your holidays, your benefits, to industry figures, *to those in our own Front Royal mill for that matter!* Look at Juniata's 20-year record of around-the-clock employment. And the TWUA? *Why isn't there a single major textile operation left in the northeastern states?* Is that the kind of job security the union keeps talking about?

Why is it that today virtually all our competition is located in the South? Simple enough! The mills down there feel safe from the bickering, dissension and unreasonable demands that come with the TWUA. *Remember Altoona Rayon?.*

Virtually all of Stehli's fabric requirements now are being woven down south. These are fabrics which for many a year were mounted on Juniata looms. Those same southern mills are just waiting to supply Mr. Hommel with every yard of computer fabric he requires. *For Juniata there is no alternative but to again become competitive.*

Not too long ago this very mill of ours was probably the finest filament mill in the country. Of late, it has been having more than its share of troubles. In the hope of finding solutions, many a change has been made. Occasionally this may have led to some dissension and misunderstanding between us. But let us not be discouraged! Like you, management seeks nothing other than a better, more competitive mill

the Company's competitors had moved South, and that the Altoona Rayon mill had followed their example? The employees knew better than that; and it is also a matter of general common knowledge. The employees knew, as does everybody else, that union demands often cause increased costs which render it difficult or impossible for management to continue operating an enterprise that is already losing money.

While Schwarzenbach's speeches were made extemporaneously and were not reported, they also must be taken as a whole, and there is no reason to doubt that the substance of the speeches is reflected in the contents of the letter of March 9, 1967.

The Company had taken care to avoid a single statement by anyone connected with management that the Altoona Rayon plant was forced by the Union to go South. That is the significance of Elden's response to a question at one of the group meetings: "I'm not allowed to say that." In fact, the stipulation shows that this very Union, The Textile Workers of America, had a contract with Altoona

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which can then again offer *true* job security to you all. This is the way to achieve better wages and benefits for all.

Many of you have known me for a long time. I have always been partial to this Juniata mill. I have never wilfully misled you. I am convinced that the Company record justifies your confidence. Now, as in the past, I firmly believe you have *absolutely nothing to gain* by voting in the union.

Be Sure To Vote, But Let It Be A
Resounding "No" On March 16th.

Sincerely,

THE SCHWARZENBACH HUBER COMPANY
/s/ ROBERT M. SCHWARZENBACH
Robert M. Schwarzenbach
President

RMS:MM

(Emphasis in original.)

Rayon for seven years before it moved in 1953. Certainly that plant could not have closed its doors as a reprisal against unionization.

We have studied this record, including all the exhibits, with the greatest care, and we find absolutely nothing to indicate antagonism or hostility toward this Union or any union. The most substantial of the findings of Unfair Labor Practices we have set aside. Of the two remaining findings of Unfair Labor Practices, that we will enforce, the first was the inconsequential Brown incident, to be described presently, and the other was the formation of the Committee, after the election and many months after the sending of the letter of March 9, 1967. And the Committee was voluntarily disbanded by the Company not long after it was established and commenced to function. Under all these circumstances, there is nothing to support an inference that the references to the possibility of moving South were intended to or in fact did constitute a threat to retaliate by closing the plant if the Union won the election. To paraphrase the statement in *Golub*, 388 F. 2d at page 928, "The only fair reading is that the employer would take these steps solely from economic necessity and with regret."

Nor do we find anything to the contrary in *N. L. R. B.* v. *Miller*, 341 F. 2d 870 (2d Cir. 1965). There this Court evidently thought the views expressed by the employer so far outran any possible basis for what was said as to justify the inference that a threat of reprisal was intended. This is not such a case. And we reaffirm the statement in *Golub*, 388 F. 2d at page 928, that the principle of *Miller* as above stated "is a principle that must be kept within narrow limits."

We conclude that the references to the possibility of moving South in the Schwarzenbach speech and in the letter

of March 9, 1967 and elsewhere did not constitute, within the meaning of Section 8(a)(1), and Section 8(c), a threat that the Company would retaliate by moving South if the Union won the election. We set aside the finding of the Board that these communications violated Section 8(a)(1) and we refuse to enforce it.

C

The Alleged Threat to Bargain From Scratch.

Employee Massini testified that Taylor told her that if the Union got in "The slate would be wiped clean. The Company would start bargaining from scratch with no paid holidays or vacations."

This is an isolated instance. It goes contrary to all the discussions that had been going on for weeks in the group meetings where the constant subject of the dialogue between Taylor and various employees related to the bargaining process whereby the Union if elected would or could meet the gripes of the employees.

The alleged interview was first with Grossman who at Massini's request asked Taylor to come down and they both talked to her. When her affidavit given to the Board was produced on cross-examination it appeared, so far as we can make out from the transcript, that Massini had attributed to Grossman what she testified was said by Taylor. When counsel for the Company offered the affidavit as impeachment, this was met by the objection, which is not intelligible to us, that such matters did not constitute "contradictions," and the affidavit was not admitted. Both Grossman and Taylor denied making any statement about "bargaining from scratch" but the Trial Examiner credited

Massini's version. Nevertheless, it seems highly improbable that Taylor would make such a statement.

We think, in the context of the entire testimony, that in this instance also the Trial Examiner reached an erroneous conclusion. We set aside and refuse to enforce this finding of Section 8(a)(1) violation as not supported by substantial evidence on the record as a whole.[11]

D

The Conversation Between Lewis and Bradley About Bumping.

Just about scraping the bottom of the barrel the Trial Examiner charges as a separate violation of Section 8(a)(1) a conversation between supervisor Lewis and employee Bradley. These two were old and constant, intimate friends. Each was the best man at the other's wedding. All this conversation amounts to is that Lewis, in the conversation with Bradley, referred to some of the group sessions in which some of the employees got the impression, or it was rumoured that "there was going to be bumping in every department on the floor and also, there was going to be several bosses replaced." As he knew Bradley was strong for the Union and he suspected Bradley would be President of the Union if the Union won the election, Lewis asked Bradley if there was any truth in these rumours. Bradley replied: "I attended all the union meetings and not once did I hear any mention of any bosses being replaced." Bradley also

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11 And see *Bauer Welding & Metal Fabricators, Inc.* v. *N. L. R. B.*, 358 F. 2d 766 (8th Cir. 1966); *Surprenant Mfg. Co.* v. *N. L. R. B.*, 341 F. 2d 756 (6th Cir. 1965); *Hendrix Mfg. Co.* v. *N. L. R. B.*, 321 F. 2d 100 (5th Cir. 1963). See also *Irving Air Chute Co.* v. *N. L. R. B.*, 350 F. 2d 176 (2d Cir. 1965).

told Lewis that he had no intention of being President of the Union.

How this disposition of an idle rumour running around the plant can be inflated into an Unfair Labor Practice is beyond our comprehension. We set aside this finding of violation of Section 8(a)(1) and refuse to enforce it. This is included in the general catch-all of Conclusion 7 of the Trial Examiner's decision, adopted by the Board. The various findings of Unfair Labor Practices in violation of Section 8(a)(1) are so scrambled and fragmented in the decision of the Trial Examiner that we may have missed one or two minor items, but we think not.

E

The Reprimand Administered to Clyde Brown.

While the incident is not one of great consequence, we think the Company did discipline Brown for soliciting for the Union in the plant during working hours, whereas it had previously followed a very liberal policy of permitting, at least on one occasion, solicitation for other than union purposes during working hours. We sustain this finding of violation of Section 8(a)(1) and will enforce it, as modified by the Board. This is the only one of the alleged violations of Section 8(a)(1) summarized in Conclusion 7 of the Trial Examiner and adopted and modified by the Board that we sustain and will enforce.

F

The Employee Committee.

After the election the Company thought it was a good idea to form an Employee Committee with rotating groups

of employees to bring complaints of the employees to the attention of management and assist in a proper, just and equitable processing of these complaints. The Company chose the employees who were to serve on the Committee, paid them for the time they spent on the business of the Committee and controlled the whole affair. This was a clear violation of Section 8(a)(2). There is no doubt that the Committee was a Labor Organization as defined in the Act. We sustain this finding of the Board and will enforce it, despite the fact that the Company voluntarily disbanded this Committee on July 27, 1967. This is Conclusion 6 of the Trial Examiner, adopted by the Board.

We permit the order setting aside the election to stand, not for the reasons given by the Board, but because we think it is better for all concerned to have a new election, if either the Union or the Company so desires.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23756

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

J. M. MACHINERY CORPORATION,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board (Florida Case)

(April 9, 1969)

Before BROWN, Chief Judge, COLEMAN and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: In November of 1964, ten of fourteen employees of J. M. Machinery Corporation (hereinafter Company) signed union authorization cards. On November 29, 1964, the Union's[1] representa-

[1]International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO Local 609.

tive sent a letter to the Company asserting that the Union represented a majority of the Company's employees, requesting recognition, and offering to demonstrate majority status through a card check by a third party. The Company did not reply but four weeks later stipulated to a Board-conducted election. The Union first filed an unfair labor practice charge during the course of the election campaign and filed additional charges after the election which the Union lost seven to six with one vote challenged. The Regional Director sustained the charges and set the election aside. The Union thereupon filed a refusal to bargain charge which has led ultimately to this appeal.

After a hearing, the Trial Examiner found that through coercive interrogation, threats, wage increases, and promises of both an employee's policy handbook and employer-employee grievance sessions the Company had violated Section 8 (a) (1) of the Act, Title 29 U.S.C., Sec. 158 (a) (1). He found further that by signing authorization cards a majority of the employees validly authorized the Union to represent them. The Trial Examiner thus concluded that the refusal to bargain on and after November 29, 1964, was motivated out of a bad faith attempt to dissipate the Union's majority and consequently was a violation of Section 8 (a) (1) and (5) of the Act, Title 29 U.S.C., Sec. 158 (a) (1) and (5). The Examiner's recommended order directed the Company to cease and desist its unfair labor practices, to post notices, and to bargain with the Union upon request. The Board's order, reported at 155 N.L.R.B. 860, affirmed the Trial Ex-

aminer's order and substantially adopted his findings, conclusions and recommendations.[2] The Board's petition for enforcement followed. The order will be enforced in part and denied in part.

I.

THE 8 (a) (1) VIOLATIONS

We find that there is substantial evidence in the record as a whole to support the Board's conclusion that the Company had engaged in unfair labor practices in violation of Section 8 (a) (1) of the Act. Universal *Camera Corp. v. N.L.R.B.*, 1950, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456. Specific itemization of the evidence would serve little purpose here. Succinctly stated, the evidence indicated threats of moving the plant if the Union came in, of dismissal and of surveillance, promises of benefits and of financial help, wage increases to the two lowest paid employees, and unlawful interrogation of the employees.[3]

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[2]The Board included the card of Richard Wood in the Union's majority while the Trial Examiner excluded Wood's card. This made the election results stand at nine for and five against union representation. See Note 5. The Board also stated additional grounds for finding that James Myers was a supervisor.

[3]The Company asserts that it is entitled to make inquiries of its employees in order to ascertain their union views. While such an inquiry is proper, it can only be accomplished under carefully prescribed circumstances. Such controls were not exercised in the present case, accordingly the unlawful interrogation finding was proper. See *International Union of Operating Engineers, Local 49 v. N.L.R.B.*, D.C. Cir. 1965, 353 F.2d 852. See also the Board's decision on remand. *Struknes Construction Co., and International Union of Operating Engineers, Local 49*, 1967, N.L.R.B. 102, in which the Board enunciated five conditions which must be met before polling of employees may be classified as lawful.

One potentially troublesome point raised here is the factual determination of the status held by employee James Myers. Nine of the thirteen unfair labor practice violations that occurred were attributable to Myers. Predictably, the Company asserts that it should not be held responsible for Myers' conduct because he did not hold a supervisory position. Whether or not an employee is a supervisor is a question of fact and the Board's resolution of the issue is conclusive if supported by substantial evidence. *Trailmobile Division, Pullman, Inc. v. N.L.R.B.*, 5 Cir. 1967, 379 F.2d 419; *Peoples Service Drug Stores, Inc. v. N.L.R.B.*, 6 Cir. 1967, 375 F.2d 551; *N.L.R.B. v. Griggs Equipment, Inc.*, 5 Cir. 1962, 307 F.2d 275. The Board's finding that Myers was a supervisor is primarily based on the credibility determinations of the Trial Examiner who credited the testimony of the employees over that of the Company officials. "It is generally held that whether made by jury, judge, or agency a determination of credibility is non-reviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it". *N.L.R.B. v. Dixie Gas, Inc.*, 5 Cir. 1963, 323 F.2d 433, 437. See also *N.L.R.B. v. Plymouth Cordage Company*, 5 Cir. 1967, 381 F.2d 710; *Great Atlantic & Pacific Tea Company v. N.L.R.B.*, 5 Cir. 1966, 354 F.2d 707; *N.L.R.B. v. Camco, Inc.*, 5 Cir. 1965, 340 F.2d 803, cert. denied 382 U.S. 926.

The Board's findings based largely on the employees' testimony are summarized below. Myers recommended several employees for hire and those men were subsequently hired. Company officials presented Myers to the men as Foreman and superintendent. On

at least one occasion, Myers was involved in the disciplining of an employee. When employees wanted time off from work, they notified Myers. He assigned the men work and gave them instructions. The Company president asked Myers to help evaluate the employees' feelings about the Union and Myers rather zealously complied with the request.

We conclude that substantial evidence supports the Board's finding that Myers was a supervisor[4] and that the Company was responsible for his acts. In view of this holding it is not necessary to consider the Board's alternative theory, which briefly stated was that because the employees reasonably regarded Myers as representing management policy, the Company should be responsible for his acts even if Myers was not a supervisor.

II.

THE 8 (a) (5) VIOLATIONS

The more difficult question presented by this appeal is whether the Board properly found that the Company violated Section 8 (a) (5) of the Act by refusing to bargain with the Union on and after November 29, 1964. The Trial Examiner's order which the Board adopted held that the Company in bad faith refused recognition in order to gain time to undercut the Union's majority. As evidence of bad faith, the Board

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[4]For a discussion dealing with the definition of supervisory status, see *NLRB v. Security Service Inc.*, 5 Cir. 1967, 384 F.2d 143.

relied solely on the numerous Section 8 (a) (1) violations. It is axiomatic that a company may not be found to have refused to bargain in bad faith if at the time of the union's request, the union did not have a majority. *A.T.T. Semi-Conductors, Inc. v. N.L.R.B.*, 5 Cir. 1968, 395 F.2d 257; *N.L.R.B. v. Southland Paint Company, Inc.*, 5 Cir. 1968, 394 F.2d 717; *N.L.R.B. v. Lake Butler Apparel Company*, 5 Cir. 1968, 392 F.2d 76; *N.L.R.B. v. Peterson Brothers, Inc.*, 5 Cir. 1965, 342 F.2d 221. Thus we must first determine if the Board was correct in finding that the Union had a majority at the time of its demand.

Here the conclusion of the Board that a majority status was demonstrated in spite of the Union's loss in the election is based solely upon the fact that a majority of the employees had signed authorization cards.[5] The Board found that the cards were unambiguous because they contained no mention of an election and plainly stated that the employee was authorizing the

[5]Of the appropriate unit of fourteen employees, ten signed cards. The Trial Examiner excluded two of these cards. Employee Pope's card was not counted because he had not signed a card until April, 1965, four months after the election. Employee Wood's card was eliminated because the Trial Examiner found that he had a strong company bias and would have voted against the Union even if no unfair labor practices had occurred. The remainder of the cards were held to be valid authorizations by the Trial Examiner thereby giving the Union a majority of one, eight of fourteen. The Board agreed with the exclusion of Pope's card but counted Wood's. The basis for the Board's inclusion of Wood's card was that in view of the unambiguous nature of the card and the thorough explanations of the consequences of signing the card, the Trial Examiner improperly considered Wood's subjective intent and should not have speculated as to how Wood would vote.

Union to be his collective bargaining agent. The Board found further that there was no evidence of misrepresentation.[6] Therefore the Board applied its usual rule that valid authorization cards may not be questioned. Thus the Board concluded that inquiry into the thoughts and afterthoughts of the signer need not be made. *Joy Silk Mills, Inc. v. N.L.R.B.*, D.C. Cir. 1950, 185 F.2d 732, cert. denied 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350; but see *N.L.R.B. v. Southland Paint Co.*, supra at 724; *Edward Fields, Inc. v. N.L.R.B.*, 2 Cir. 1963, 325 F.2d 754.

Because of their frequent unreliability[7] this Court scrutinizes with great care authorization cards which

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[6]It is apparent from the quoted language below that the Trial Examiner used the doctrine of *Cumberland Shoe*, 1963, 144 N.L.R.B. 1268, enforced, 6 Cir. 1965, 351 F.2d 917, to test whether or not there had been misrepresentation in the procurement of the cards. "Other witnesses testified that the Union leaders at the meeting did not indicate that the cards would be used *only* for an election. . . ." ". . . . I find that the employees were not told before they signed, the cards were *just* for an election. . . ." (Emphasis added). Although the Trial Examiner cited no authority for the above statements, they are principled upon the *Cumberland Shoe* doctrine which holds that a card can only be invalidated when the employee is told that the card is for the sole purpose of obtaining an election. This circuit has rejected this test. See *N.L.R.B. v. Lake Butler Apparel Company*, supra; *Engineers & Fabricators, Inc. v. N.L.R.B.*, 5 Cir. 1967, 376 F.2d 482.

[7]For a discussion of the reliability problem, see *N.L.R.B. v. Southland Paint Co.*, supra; *N.L.R.B. v. S.S. Logan Packing Company*, 4 Cir. 1967, 386 F.2d 562; Comment, Union Authorization Cards, 75 Yale L.J. 805 (1966). We note also that the United States Supreme Court has recently granted certiorari at 393 U.S. 997, — S.Ct. ——, 21 L.Ed.2d 462, in two cases, *N.L.R.B. v. Gissel Packing Co.*, 4 Cir. 1968, 398 F.2d 336 and *Sinclair Co. v. N.L.R.B.*, 9 Cir. 1968, 397 F.2d 167. These cases present the question of whether or not an employer, because of the alleged inherent unreliability of authorization cards, is justi-

form the basis of a majority claim. We think the test enunciated in *N.L.R.B. v. Peterson Brothers Co.*, supra, is a good and fair legal standard, i.e. "the Board must establish that the signer of the card did, in effect, do what he would have done by voting in a Board election". This rule protects the vital interest in the selection of a bargaining representative — employee free choice. Accordingly to help determine if such a choice has been made, this Circuit has held that an inquiry into the subjective intent of the signer must be made in at least two instances: first, when the only proof of union majority is ambiguous authorization cards, *I.T.T. Semi-Conductors, Inc.*, supra; *N.L.R.B. v. Southland Paint Co.*, supra; *N.L.R.B. v. Peterson Brothers, Inc.*, supra; second, when unambiguous cards are challenged with proof of misrepresentation in their procurement. *N.L.R.B. v. Tex. Elec. Cooperatives*, 5 Cir. 1958, 398 F.2d 722; *N.L.R.B. v. Lake Butler Apparel Co.*, supra; *Engineers & Fabricators, Inc. v. N.L.R.B.*, supra.

Our immediate task then is to determine if the authorization cards are free from the ambiguities found in the cards used in *I.T.T. Semi-Conductors*, supra, *Southland Paint*, supra, and *Peterson Brothers*, supra. After comparing the three cards used in these cases, we conclude that the card in the present case is less ambiguous than those used in *I.T.T. Semi-*

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fied in refusihg to bargain when the only proof of a union's majority is authorization cards. The Supreme Court's determination of that issue will have little effect on the case at bar because here the cards were obtained through misrepresentation whereas there is no issue of misrepresentation in the cases which the Supreme Court has under consideration.

Conductors and *Peterson*, but contains the same ambiguity as Judge Wisdom found in Southland. For the purposes of comparison the texts of the two cards are set out below.[6]

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[6]The *Southland* card read as follows:

THE LAW OF THE UNITED STATES PROVIDES THAT workers have the right to designate a union to represent them for the purpose of collective bargaining with their employer.

AUTHORIZATION

NAME _____

ADDRESS _____ CITY _____

EMPLOYER _____

AREA _____ SHIFT _____ CLASSIFICATION _____

I hereby designate and authorize the Oil, Chemical and Atomic Workers International Union AFL-CIO, as my collective bargaining agent in all matters pertaining to wages, rates of pay and conditions of work.

_____

Signature

Date _____

WITNESS _____

CONFIDENTIAL: Neither your employer nor his representative will see this signed authorization card.

The card used in the case at bar reads:

AUTHORIZATION FOR REPRESENTATION

(This is not an application for membership).

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO.

Fill in all blanks Date _____

I The undersigned employee of _____

_____

(name of company)

hereby select the above named Union as my collective bargaining agent.

Name of Employee _____

Home Address (please print) _____

City _____

State _____

Phone _____

_____

Signature

The differences in the two cards are not significant. The *Southland* card has the sentence "THE LAW OF THE UNITED STATES PROVIDES THAT . . ." while the card in dispute has no such statement. The *Southland* card contains the "CONFIDENTIAL" phrase which is absent in the present case. The *Southland* card is silent as to the matter of membership while the card in the case at bar specifically states that it "is not an application for membership".

The similarities between the two cards on the other hand are highly significant. Neither card makes any mention of the election possibility. Neither card clearly states that if a majority of the appropriate unit sign the authorization cards, recognition may be obtained without an election. Neither card gives the impression of cruciality that one might expect if the signing of a card may serve as a substitute for an election. Judge Wisdom explained in *Southland* that the caveat of confidentiality contained in the card created the impression that the signing of the cards was not a crucial act, rather it gave the impression that the cards would form a basis for a secret election. We think the lack of an impression of cruciality is even more manifest here because the card contains the phrase "This is not an application for membership". It would be difficult for the average employee to understand that although he signs a card which plainly states that it does not make him a member, the union can use that same card to seek recognition without an election and if recognized, become his bargaining agent. Thus, the disclaimer of membership creates the impression that the act of signing was not in itself the critical

act and the resulting conclusion that the cards would form a basis for an election seems to be a reasonable and natural consequence. In sum, the words of Judge Wisdom in *Southland* seem uncommonly appropriate:

> *"Looking at the face of the card, we find it clearly states that the signer designated the union as the bargaining agent in the unit. But exclusions may be more telling than inclusions. If an authorization card is to be relied upon in lieu of an election, it is only fair for the cards to say so.* In the light of the solicitors' oral statements, the omission of such a statement was a misrepresentation of the purpose for which the card was to be used. We observe too that the card omits any reference to the signer's membership in the union. As the court said in *Nichols (N.L.R.B. v. S. E. Nichols Co.*, 2 Cir. 1967, 380 F.2d 438) this is 'one thing that an employee would readily understand.'" (Emphasis added)

To conclude, the card is ambiguous because it does not state the purposes for which it may be used and this ambiguity is further compounded by the non-membership disclaimer. To reiterate, if unions wish to perfect their majority claims on the basis of authorization cards they should do so with cards which clearly state their purpose.

Although we have held these cards to be ambiguous, our task has not ended. We must carefully examine the effect of signing within the context of solicitation in

order to determine if the employees understood what they were signing. *N.L.R.B. v. Tex. Elec. Cooperatives*, supra; *N.L.R.B. v. Southland Paint Co.*, supra. Thus we now turn to the facts and circumstances before us.

Five of the nine cards were signed after hours in the parking lot of the "Idle Hour" tavern. Former employee Ivan Harmon signed up four of the five men present.[9] All but one of the men testified that Harmon had told them that the cards would be used to obtain an election.[10]

After these men had signed, employee Hornsby arrived. He testified that he told the men that "it was not a membership card that it was strictly a card

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[9]Five of the seven cards signed at the "Idle Hour" meeting were ultimately counted as part of the Union's majority; i.e. those of Wood, Green, Griffin, Langston, and Hornsby. Two other men, Ivan Harmon and Sheffield, signed but were never counted as part of the Union's majority. The four men Harmon got to sign were Wood, Green, Griffin and Sheffield. Langston and Hornsby did not sign until later that evening.

[10]Harmon addressed the men individually rather than as a group. Harmon was not asked about what representations he made to the men. Langston, who did not sign until later, was also not asked about Harmon's solicitations. Employees Wood, an illiterate, Green and Griffin testified that Harmon told them that the cards would be used to obtain an election. Their testimony also reflected that they signed the cards to prevent anyone from getting mad at them and that they intended to make their decision at the election. However because of Wood's strong company bias his testimony was discredited by the Trial Examiner. Former employee Sheffield stated that Harmon told him that "it would take 30 percent to have an election but he didn't want an election . . . [T]he Union would get behind this thing if we got 50 percent".

which we had to have a majority of the people to sign in order to obtain recognition from the Company."[11] A short time later, Union representative Mills arrived and spoke to the men as a group. He testified that he explained that by obtaining fifty-one percent or better, a letter could be sent to the Company demanding recognition. Mills further testified that he made no mention of the election possibility. This then is a summary of the events which surrounded the card signing.

To further support the contention that the signers knew what they were signing, the following facts were relied on by the Board. Hornsby testified that he told Griffin on the day after the "Idle Hour" meeting that "[I]n two or three days you will probably see a man drive up here with a registered letter and the letter will be coming from a Union agent for representation — asking for immediate recognition". Further, the Board inferred that Griffin and Wood intended to authorize the Union as their bargaining agent in November 1964 because they signed the same kind of card in a second organization drive in April, 1965.

The presigning "Idle Hour" solicitation when coupled

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[11]The significance of the above statement is somewhat clouded by Hornsby's following testimony:

"Q. Had the subject of a letter been mentioned to the employees, a letter demanding recognition been mentioned to the employees the night before (the night of the 'Idle Hour' meeting)?

A. The night before, no, not that I know of.

Q. If it was mentioned, you did not hear it?

A. If it was mentioned I did not hear it."

with the ambiguous cards was misrepresentative.[12] We have previously noted the testimony of the employees relating to the representations made to them by the unsupervised solicitor, Ivan Harmon.[13] The significance of their testimony is not negated by the Trial Examiner's finding that "the employees were not told before they signed the cards that the cards were just for an election, and that on the contrary, they were told that the cards were for the purpose of obtaining Union representation". We interpret this statement to mean that before the men signed they were told that the cards would be used to obtain recognition without an election. If this were the case, we would apparently have no choice but to affirm under the *Southland* holding which stated at 394 F.2d 717, 730:

> "There is substantial evidence to support the finding that the Union solicitors in many instances explained that the cards designated the Union as the bargaining agent of the employees. Consistent with the examiner's premises, this finding was enough to justify the examiner's conclusion that the solicitors did not rep-

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[12]The Company asserts that the cards of Griffin, Green and Wood were not valid authorizations. If its contention is correct as to any two of these men, the Union's majority is destroyed. Thus the whole dispute centers around these men. Consequently the following shorthand terminology will be used. The representations made to the men by Ivan Harmon will be referred to as the "presigning solicitation" period because the men signed the cards after his solicitation. The representations by Hornsby and Mills which were made subsequent to the signing shall be designated as the "post-signing solicitation" period.

[13]See Note 10.

ment to the signers that the cards were *solely* for an election."

However the record clearly indicates that the statements concerning recognition without an election came after the men had signed.[14] The record reflects that only Wood, whose testimony was discredited, Griffin, Green and Sheffield testified as to the representations made by Ivan Harmon. Their testimony indicates that they were only told that a purpose of the cards was to obtain an election. Their testimony (with the possible exception of Sheffield's) gives no indication that Harmon informed them of the no election possibility. Thus if there was no mention of Union representation without an election, the fact that the men were not told that the sole purpose of the card was to obtain an election does not indicate that no misrepresentation occurred.[15] As a result, the Trial Examiner and the Board committed errors of fact and law. First, there is no substantial evidence to support their conclusion that the men were informed before signing that the signing of the cards authorized possible Union repre-

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[14]The only evidence which can possibly be construed as apprising the employees of the no election possibility is the testimony of Sheffield which we have previously quoted. See Note 10. Even if Harmon's comments to Sheffield were interpreted as informing Sheffield that recognition could be secured without an election it carries little weight with reference to Wood and Griffin because Sheffield testified that he could not vouch for what was said to anyone else. The other evidence supportive of the inference that the men knew about the no election possibility is the testimony of Hornsby and Mills. Undeniably their testimony dealt with events which occurred after Wood, Griffin and Green had signed.

[15]See Note 6.

sentation without an election. Second, they applied the wrong legal standard in determining if there was any misrepresentation, i.e. the sole purpose test. *N.L.R.B. v. Southland Paint Co.*, supra; *N.L.R.B. v. Lake Butler Apparel Company*, supra; *Engineers & Fabricators, Inc. v. N.L.R.B.*, supra.

In sum, the record reflects that the men signed ambiguous cards which were solicited by an unsupervised employee who at least told them that a purpose (as distinguished from the sole purpose) of the cards was to hold an election. These facts are remarkably similar to those found to be misrepresentative in *Southland*. Consequently, if this were all that was involved in the case we could deny enforcement without elaboration under the *Southland* authority. However the events, previously outlined, which occurred after these men signed necessitates closer examination.

Essentially we are faced with the following question: Were the representations, made after the cards had been signed, sufficient to clear up the possible misunderstanding created by the ambiguous cards and Harmon's solicitation? Apparently this is a novel question as our research indicates no factual parallel. Indeed neither the Board nor the Company dealt with this problem. The Company's focus was upon the ambiguity of the cards which is understandable in view of the fact that *Southland* was decided after the submission of its brief. The Board simply failed to delineate between presigning and post-signing solicitation.

However, the dicta in the Board's order[16] suggests the one possible theory supportive of the conclusion that the post-signing declarations were sufficient to eliminate the doubt as to the employees' intent created by the presigning misrepresentation. The theory is that if the employees did not intend to authorize union representation, they, upon learning of the cards' true purpose, would have revoked their authorization. Thus the absence of revocation under this theory is a clear indication of the employees' intent. The logical extension of this concept is that unrevoked cards should be counted as part of the union's majority, even though the initial signing had been procured by the use of ambiguous cards and misrepresentative statements, if after the signing, the union officials unambiguously and without misrepresentation explained the purposes of the cards.

While we do not discount for all purposes the significance of the lack of revocation by employees, severe practical consequences foreclose the acceptability of the theory that the lack of revocation coupled with the proof of the making of post-signing curative declarations is sufficient to sustain the burden of proof as to the signers' intent. First, the natural reluctance of an employee to go against the wishes of his fellow employees casts significant doubt as to the probative value of the lack of revocation. The Fourth Circuit in *N.L.R.B. v. S. S. Logan Packing Company*, supra, at 556, made mention of this problem:

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[16] "The card signed by Wood in November 1964 expressly authorized the Union to bargain on his behalf and Wood made no attempt to revoke their authorization".

> "Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed."

Second, the promulgation of such a rule would provoke strong temptation to abuse. Union representatives might feel free to use virtually any means to obtain signatures and only afterwards tell the employees about the card's true purposes. Thus if at the time of its demand for recognition it had a majority, the union under this theory could claim that the cards were valid because if the employees did not intend to authorize union representation they would have revoked their cards after hearing the post-signing representations.

If post-signing declarations may be used to cure defects in the solicitation process, we think it is incumbent upon the General Counsel to prove not only that the statements were made but also that the signers understood and intended to adopt the post-signing explanations. No such attempt was made here. After the cards were signed, the men waited for the arrival of Mills who explained the purposes for which the cards might be used. There was no evidence that the men understood or even listened to what Mills was saying.[17]

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[17] Indeed the evidence points to the opposite conclusion. The prime Union leader within the plant, Carlton Hornsby, testified that he heard no mention of the fact that a letter requesting recognition would be sent to the Company, a statement which Mills was credited as having made.

There was no evidence that the men were told that they could revoke the cards even if they had possessed "rare strength of character". In short, we apply the rule expressed in *N.L.R.B. v. Lake Butler Apparel Co.*, supra, and *Engineers & Fabricators, Inc. v. N.L.R.B.*, supra, which states that "the burden of proof is on the General Counsel, *once* representation cards are challenged because of misrepresentation in their procurement and proof is offered which substantiates the challenge, to show that the subjective intent to authorize union representation was not vitiated by the misrepresentation". Here, the ambiguous nature of the cards and the representations by Harmon warranted an inquiry into the subjective intent of the employees. Thus we conclude that the General Counsel failed to sustain its burden of proving that the men understood what they were signing because there was no probing into the subjective intent of the employees to determine if the workers comprehended and accepted the post-signing declarations of the Union solicitors. On this record the Board should have inquired into the subjective intent of at least two employees, Wood and Griffin.[18]

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[18]The Board held that the Union validly acquired the support of nine of fourteen workers. Thus with the elimination of Wood's and Griffin's cards the count is reduced from nine to five to seven to seven. Consequently the Union did not have a majority at the time of its demand and the Company had no duty to bargain. Since the Union is without a majority it would be superfluous to consider the validity of other authorization cards. As a result we need not discuss either the validity of Green's card or the Board's contention that consideration of this specific objection raised for the first time on appeal would be in violation of 29 USC, §160(e) which states in pertinent part that "No objection that has not been urged

The Trial Examiner specifically found that Wood would have voted for the Company even if there had been no unfair labor practices. In fact, the Trial Examiner found Wood to be so company-biased that he discredited his testimony. Yet the Board, steadfastly adhering to the *Joy Silk* doctrine that the thoughts and afterthoughts of employees cannot negate the overt act of signing an authorization card, came to the incongruous conclusion that Wood had authorized Union representation in spite of his company bias. Given the misrepresentative circumstances in which Wood's signature was obtained, the Board erred in failing to inquire into his subjective intent.

Admittedly Griffin's situation is somewhat different. In addition to the speeches of Hornsby and Mills which were delivered in the parking lot of the "Idle Hour" tavern, Griffin had the benefit of Hornsby's statement made on the following day that a letter demanding recognition would arrive in two or three days. While such evidence has clear weight it is far from conclusive as to Griffin's subjective intent because there was no showing that Griffin understood and accepted Hornsby's remarks to stand for the proposition that the cards would be used to request recognition without an election.[19] Similarly the fact that

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before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[19]The following testimony reflects the nature of Griffin's intent and the treatment given it by the Trial Examiner in his intermediate order:

Wood and Griffin signed authorization cards in a second organization drive contributes little to the question of the men's intent. Even if the men intended to authorize Union representation on the second signing, that fact is simply not conclusive as to what the men intended when they signed the cards originally. It may well be that the men changed their minds because of the hostility displayed by the Company during the first organization drive.

In conclusion, we hold that where proof of misrepresentation during the presigning solicitation has been made, post-signing statements cannot be used to cure the defects unless there is a clear showing by the

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"Q. Dennis, why did you tell Mr. Mraz that you'd signed the card the first time?

A. Well, because I was with the Company and I just wanted to keep everybody happy in the shop.

Q. When you signed your card the first time before the election, were you in favor of having the Union come in?

A. No, sir, I just signed it to keep harmony in the shop.

Q. As an offer of proof, Dennis, I would ask you on the occasion of your signing the first card would you have signed that card to bring in the Union without having an election?

A. No, sir."

The Trial Examiner stated in his order:

"With respect to Griffin's subjective state of mind at the time he signed the card, I adhere to my ruling rejecting the Company's attempt to inquire in that area, and I place no weight on Griffin's testimony on that matter even where he answered without objection from General Counsel. As stated in *Joy Silk Mills* 'an employee's thoughts (or afterthoughts) as to why he signed a Union card and what he thought that card meant, cannot negative the overt action of having signed a card designating the Union as bargaining agent.' "

General Counsel that the subjective intent of the signers was to authorize union representation. Since the General Counsel did not make such a showing here, it failed to sustain its burden of proving that the signers did what they would have done in an election. Consequently there is no substantial evidence to support the Board's conclusion that a majority of the employees had authorized the Union to be their collective bargaining agent.

There being no basis for finding a refusal to bargain other than the Board's reliance upon the signing of the cards, the order of the Board requiring bargaining with the Union cannot be enforced. Since we cannot enforce the Board's finding that the Company had a duty to bargain we need not consider the question of good faith refusal.

As to the 8 (a) (1) violations, the orders of the Board are enforced. As to the alleged 8 (a) (5) violation, the portion of the order requiring the Company to bargain with the Union will not be enforced.

The order is ENFORCED IN PART AND DENIED IN PART.

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